

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

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UNITED STATES OF AMERICA, : 16-CR-442(JMA)
: :
-against- : United States Courthouse
: Brooklyn, New York
: :
ROBERT SCHULMAN, : Friday, March 10, 2017
: 1:00 p.m.
Defendant. :
: :
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TRANSCRIPT OF CRIMINAL CAUSE FOR HEARING AND JURY TRIAL
BEFORE THE HONORABLE JOAN M. AZRACK
UNITED STATES DISTRICT JUDGE

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Court Reporter: Angela Grant, RPR, CRR
Official Court Reporter

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1 (In open court; outside the presence of the jury.)

2 (Time noted: 1:15 p.m.)

3 COURTROOM DEPUTY: All rise.

4 THE COURT: Hi. Good afternoon.

5 Please be seated.

6 So here's the plan. I thought we would do our
7 hearing. I'll hear you after the witness and then I'll give
8 you a ruling. And then I will give you a copy of the
9 proposed charge. I'll give you as much time as you want to
10 sit here and go over it, but I really would like to do the
11 charging conference today, even if we're doing it at
12 4 o'clock.

13 MR. MEAD: As would we.

14 THE COURT: Okay. Good. We're on the same page.

15 MR. PITLUCK: That's fine, Judge.

16 MR. MEAD: Your Honor, may I begin with something
17 preliminary which I don't want to sidetrack things, but
18 because, as you will hear, it involves a request for
19 information that the government might be able to run down in
20 a couple hours this afternoon that might make a discussion
21 about it more profitable as we continue, I'd like to bring
22 it up now.

23 THE COURT: Okay.

24 MR. MEAD: So I know how bitterly disappointed you
25 and the government counsel would be if a single day passed

1 in court where I didn't raise the SEC civil proceedings
2 again, but I've got a new argument for you that I actually
3 think is pretty irrefutable. So if I --

4 THE COURT: You think all of your arguments are
5 irrefutable. Your problem is me.

6 MR. MEAD: Yeah, but this one is pretty cool.

7 So in the context of briefing the admissibility of
8 the SEC complaint itself, we didn't have the 3500 material
9 for Mr. Shechtman at that point. And so -- and I really
10 want to make it clear, I'm not alleging any
11 misrepresentations by the government in any way. We were
12 briefing what had happened in September, if you recall.

13 So we said the SEC complaint filed in September of
14 2013 reflected both an 8038 report of a law enforcement
15 agent, you know, after investigation dually authorized by
16 law. We also argued it was a party opponent state. And the
17 briefing there was, there was no joint investigation as of
18 September 2013, therefore, the complaint -- and Your Honor
19 ruled that because DOJ was not involved at that stage, it
20 couldn't be held as a party opponent statement by DOJ.
21 Understand.

22 So now that we've got the 3500 material, here's
23 the sequence of events. On December 17, 2013, several
24 months after the SEC complaint was filed, Mr. Shechtman
25 testified and the interview memos confirm that he was

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1 interviewed at the SEC offices in Florida December 17, 2013,
2 and that John Nowak of the Eastern District of New York was
3 present as was agent DeGiudice. So by December 17, 2013
4 there was now a joint investigation of the SEC and the DOJ.

5 THE COURT: You call it joint just because Nowak
6 was at the interview?

7 MR. MEAD: Sure. They're now working together
8 now.

9 THE COURT: They're sitting at a table together.

10 MR. MEAD: But they're working together.

11 So here's what we know. Amongst the 3500
12 material --

13 THE COURT: Why do you say they're working
14 together?

15 MR. MEAD: They jointly interviewed this witness,
16 and let me continue the chronology because I think it's
17 pretty clear they were working together.

18 THE COURT: Okay. Okay.

19 MR. MEAD: So we have in the 3500 material a
20 proffer letter suggesting that another interview was
21 scheduled for Shechtman on December 26, 2013. The proffer
22 letter is dated that day. We have no interview notes that
23 day. I'm guessing it got rescheduled.

24 THE COURT: I hope so for your sake.

25 MR. MEAD: Right. Exactly.

1 On December 30, 2013 the SEC and Mr. Shechtman
2 jointly filed the consent filing to have a consent order
3 entered. Remember, that's Defense Exhibit 203. I tried to
4 introduce it through Mr. Shechtman and you refused that
5 request.

6 THE COURT: Yes.

7 MR. MEAD: It is reasonable to infer -- and just
8 two more facts quickly. That order was entered in
9 January 2014 by a United States District Judge based on the
10 allegations of the complaint that was filed in September.
11 There was no amendment. In other words, the government
12 filed a pleading asking a judge of the United States to
13 enter a judgment against a human being for violation of
14 insider trading. To do that the judge had to make a finding
15 of actual liability based on the fact that the allegations
16 in the complaint why neither admitted nor denied.

17 The only basis for judgment of one element of that
18 offense, both civilly and criminally, is that there is a
19 breach of a duty of confidentiality. The only breach of
20 duty of confidentiality alleged in that complaint was a
21 misappropriation, a breach of Mr. Schulman's confidence, not
22 that that they acted together. Different theory.

23 It is reasonable to infer, Your Honor, that in
24 coordination with each other, the Department of Justice,
25 EDNY, and the SEC jointly said, let's get the consent

1 against Shechtman entered first because we, the EDNY, are
2 going to move for a stay of discovery which they did in
3 February of 2014.

4 It is reasonable to infer from that chronology
5 that the timing was coordinated between the two offices,
6 that the Department of Justice was aware of and approved the
7 filing of the consent. Even though it was done by a
8 separate agency, it's now a coordinated effort. And that,
9 that, and so what I'd ask, when I say it would be helpful
10 for us to get information to discuss this later this
11 afternoon, what I'd like to request is that the U.S.
12 Attorney's Office provide for us, for you in camera,
13 whatever else, documents related to that period of time in
14 coordination between the two offices and the EDNY's
15 knowledge that that consent order was being filed, because
16 that document, that inference, the chronology and everything
17 else, reflects that the Eastern District of New York was
18 involved in making a request to a United States District
19 Judge to enter judgment based on factual allegations of that
20 complaint. That means it becomes a statement of a party
21 opponent because you remember the rule that you relied on.

22 It also, it also changes the analysis with respect
23 to your 8038 analysis. Because your 8038 analysis said a
24 complaint itself is mere allegations, therefore, not as
25 probative. Very different thing for -- in terms of analysis

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1 of a court pleading -- for the SEC and the EDNY to now tell
2 a judge there's a basis for liability against a human being.
3 We ask you to enter judgment. It's a very serious thing.
4 And we ask you to enter judgment based on these factual
5 allegations. That reflects -- these are no longer mere
6 allegations from the SEC. They are now saying these are
7 facts that we ask a United States District Court Judge to
8 rely upon in entering judgment.

9 That changes the analysis. This is something new.
10 I think it is yet another basis for both allowing into
11 evidence the filing of the consent and the underlying SEC
12 complaint because without it, you can't know the basis for
13 on which the consent was entered.

14 MR. PITLUCK: Judge, I would like to make a couple
15 points. One is that, as the Court is aware, the 3500
16 material was provided almost two weeks ago. And this is the
17 first we've ever heard of this argument. And I think it's
18 clear to the Court that after numerous attempts to get this
19 complaint in under different basis, all of which the Court
20 has very properly denied, that didn't work so now we're
21 going to this.

22 And, Judge, if we had been prepared with this
23 argument, we could have pointed the Court to voluminous case
24 law that the Court is aware of that says that even if true,
25 that is not the basis to find a joint investigation between

1 the SEC and the Department of Justice. We don't think we
2 need to provide anything related to this. We have provided
3 everything that would be necessary to show the allegations
4 that he's complaining of now.

5 The fact that the SEC entered a summary judgment
6 motion, resolution motion in Florida, was not entered by the
7 government. And the fact that they were at the same proffer
8 does not change it. The fact that a discovery order was not
9 changed. This is a completely separate investigation. This
10 is not even close to the high standard in the Second Circuit
11 for a joint investigation. We think this request is
12 untimely and improper, and we do not think we have to
13 provide that material.

14 MS. NESTOR: Your Honor, I did cite case law in my
15 initial briefing which talked about what a joint
16 investigation means. This does not fall under that case
17 law. It was very specific.

18 Joint investigations have found that hundreds of
19 interviews are conducted simultaneously. Not where a
20 complaint is filed initially and then the government gets
21 involved where the government had absolutely no power over
22 filing the complaint. This is yet another backdoor attempt.
23 It is completely contrary to case law and that's why he
24 doesn't cite it.

25 MR. MEAD: So, again, we're not talking about the

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1 complaint. I really want to make that clear. What we're
2 talking about is a motion, consent motion filed by Shechtman
3 and his counsel and the SEC after the SEC and DOJ met
4 together. And remember Mr. Shechtman's testimony. His
5 testimony was not --

6 THE COURT: Met together?

7 An assistant was at an interview.

8 MR. MEAD: And they coordinated their activity,
9 Your Honor. It is pretty clear from this chronology that
10 the two parties agreed, look, the EDNY wants to move for a
11 stay of the proceedings. We don't want discovery while
12 we're doing an investigation.

13 The SEC says we want to get a civil consent
14 judgment entered before you do that. So we ask as a
15 coordinated effort your approval --

16 THE COURT: You keep saying coordinated. What is
17 the U.S. Attorney's Office, what are they doing in this that
18 they're coordinating?

19 MR. MEAD: So I would be surprised, and this is
20 why I'm asking for the information. The short answer is of
21 course I can't answer unless I get this information from the
22 government. But it is reasonable, it is certainly
23 reasonable to --

24 THE COURT: Well, what's the information?

25 MR. MEAD: The information --

1 THE COURT: A hearing having an Assistant U.S.
2 Attorney say all the assistant did was go to Florida and be
3 present at the interview and ask questions at the interview?

4 MS. NESTOR: Your Honor, we can't even get this
5 witness here for that kind of hearing. He's not at the U.S.
6 Attorney's office.

7 MR. MEAD: So, Your Honor, the evidence for
8 Mr. Shechtman is not just that EDNY attorneys and the SEC
9 met once with Mr. Shechtman, that's not the evidence. The
10 evidence is that on January 8, 2013 there was another joint
11 interview attended by both the SEC and the EDNY. On
12 April 3, 2014 there was yet another joint interview
13 conducted by the SEC and the EDNY. That is a joint
14 investigation.

15 In a case of this size, we're not going to have
16 hundreds of simultaneous interviews. This is the only
17 investigation that's going on. It is coordinated. And so,
18 once again, virtually guaranteed. You know, I know how the
19 system works. I'm sorry. You know, I don't have the pieces
20 of paper in front of me, but I guarantee you this is what
21 happened. Mr. Nowak said I want to move for a stay because
22 we're going to do an investigation. The SEC said we want to
23 file a consent judgment against Shechtman first, get it
24 signed before you intervene and virtually guaranteed the
25 EDNY said yes, go ahead.

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1 THE COURT: But why --

2 MS. NESTOR: Why is that coordinated?

3 THE COURT: Hold on. Hold on.

4 Why does that make it a joint investigation? I
5 don't think that makes it a joint investigation.

6 MR. MEAD: They are acting in -- so, first of
7 all --

8 THE COURT: Wait. If that's your argument that
9 that's what makes it a joint investigation, it's not going
10 anywhere.

11 MR. MEAD: So, Judge, I guess I'm confused. What
12 is it that would cause coordinated activity between the
13 Eastern District of New York and the SEC to be a joint
14 investigation? I'd like to understand because if that's not
15 it, what is?

16 MR. PITLUCK: Judge, we'd be happy to point to
17 some case law that shows what it is. And it's a very, very
18 stringent test that the Second Circuit has set forth on
19 repeated occasions.

20 This doesn't even come close. Judge, if that was
21 the case, any time the Eastern District or any U.S.
22 Attorney's Office intervened in or even participated in a
23 joint SEC -- in an SEC investigation at the same time, that
24 would constitute a joint investigation.

25 THE COURT: Or there was any overlap.

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1 MR. PITLUCK: Or there was any overlap or even
2 communication between the two to schedule something, that
3 would be a joint investigation. That is not what the law
4 says. I think the Court is aware of that. But this is -- I
5 mean, this is, Judge, this is really beyond the pale.

6 MR. MEAD: So, Your Honor, what if, and I suspect
7 there is. What if there is an email exchange between the
8 EDNY and the Southern -- I'm sorry -- and the SEC where SEC
9 counsel tells them we're going to file for a consent
10 judgment based on the complaint and the EDNY says, yes, go
11 ahead.

12 THE COURT: I don't think that makes it a joint
13 investigation.

14 MR. MEAD: It makes it a statement by a party
15 opponent.

16 THE COURT: I've heard enough. I don't want to
17 waste any more time. Let's do the Daubert hearing.

18 I'm going to consider your arguments.

19 MR. MEAD: Thank you, Your Honor.

20 Should I call Mr. Dubinsky?

21 THE COURT: Yes, please.

22 MR. MEAD: We call Bruce Dubinsky.

23 Your Honor, I assume you have Mr. Dubinsky's CV.

24 THE COURT: I do.

25 MR. MEAD: Okay. Understand in front of the jury

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1 we'll mark it as a separate exhibit, but we're not quite
2 that coordinated yet.

3 THE COURT: Finally here.

4 THE WITNESS: It's been a while. It will be nice
5 to sit in a comfortable chair.

6 BRUCE DUBINSKY, called as a witness, having been duly sworn,
7 was examined and testified as follows:

8 COURTROOM DEPUTY: State your name for the record
9 and spell it for the court reporter.

10 THE COURT: Bruce Dubinsky, B-r-u-c-e
11 D-u-b-i-n-s-k-y.

12 COURTROOM DEPUTY: You may have a seat.

13 THE WITNESS: Good afternoon, Your Honor.

14 THE COURT: Good afternoon.

15 MR. MEAD: Has the Judge -- oh, thank you, John.
16 I appreciate it.

17 DIRECT EXAMINATION

18 BY MR. MEAD:

19 Q Mr. Dubinsky, good afternoon.

20 A Good afternoon, Mr. Mead.

21 Q How old are you, sir?

22 A I'm 56 years old.

23 Q Where did you grow up?

24 A Rockville, Maryland.

25 Q What did your folks do for a living?

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1 A My mother was a schoolteacher in Montgomery County,
2 Maryland, middle school and elementary school. And my
3 father was an aeronautical engineer.

4 Q Did you go to college?

5 A Did they?

6 Q Did you?

7 A Oh, did I? Yes, I did.

8 Q Where?

9 A I first started at Rutgers University in New Brunswick,
10 New Jersey. I started out for premed. I decided I didn't
11 want to be a doctor, and finished my studies at the
12 University of Maryland in business obtaining a bachelor of
13 science degree in accounting in 1983.

14 Q Did you continue your education after that?

15 A I did. Several years later I enrolled at Georgetown
16 University in Washington, D.C. in the masters of taxation
17 program; graduated with high honors in 1986.

18 Q After you graduated from Maryland in 1983, did you go
19 to work?

20 A I did.

21 Q In what capacity?

22 A I went to work as an accountant. I had not yet passed
23 the certified public accountant test. You needed two years
24 at that time of work experience. And I went to work for a
25 firm called Alexander Grant & Company. They're now known as

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1 Grant Thornton. It was an international accounting firm in
2 Washington, D.C. They're based out of Chicago, but I was
3 working in Washington, D.C. And I started out working in
4 the audit department as a staff auditor. And within several
5 years did an internal transfer to the tax department where I
6 worked on tax compliance matters, some basic financial
7 planning matters for tax clients and tax planning and estate
8 planning.

9 Q And how long did you work at that Grant firm?

10 A It was about three and a half years. I left about
11 mid-1986 and went to work for a real estate syndication
12 company. It was an investment company. And I was in
13 charge -- I was the Assistant Vice President of Finance and
14 I was conducting due diligence and financial information on
15 real estate projects all around the country. Hotels -- they
16 were commercial projects, hotels and apartment buildings.

17 Q And in that period of time did you get your CPA
18 license?

19 A Yes, I obtained it before I left Grant Thornton. It
20 was in 1985 that I passed the examination and became
21 licensed.

22 Q And how long did you work at that real estate company?

23 A About -- it was probably less than four months. They
24 ran into some financial problems in getting money for future
25 projects. I saw the writing on the wall and I bailed pretty

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1 quickly. And I started my own -- there were two people that
2 I had met in the industry, and the three of us started a
3 real estate development company in Washington, D.C. called
4 Metropolitan Development Group where we developed urban
5 infill projects at that point in D.C. in --

6 THE COURT: You said infill?

7 THE WITNESS: Yes.

8 THE COURT: What is that?

9 THE WITNESS: So, Your Honor, there would be a
10 block and there would be some development going on. And
11 there would be projects that we would infill between those
12 two developments.

13 And at that time Washington, D.C., there were some
14 neighborhoods that were up and coming and we were going into
15 those transitional neighborhoods, building apartment
16 buildings, renovating townhomes. And the other part of the
17 business was commercial real estate build out where I would
18 go into office buildings and build the offices. And we did
19 things like eateries at malls. We had an architecture firm
20 and the development company.

21 Q And how long did you do that?

22 A That was about four years. And the economy tanked at
23 the end of '89. And I had one baby already, another one on
24 the way and needed to go make some money at that point and
25 went back into public accounting.

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1 Q Okay. Fair enough.

2 And 1989 is the test of real estate survival in
3 Washington, D.C.

4 A It was not pretty.

5 Q So when you went back into the CPA practice, what did
6 you do?

7 A I went to work for a regional CPA firm in Bethesda,
8 Maryland and I was the director of their tax department.
9 That practice comprised of high net worth individuals,
10 doctors, lawyers, architects, business owners. And I was in
11 charge of the tax department and IRS audits. So as IRS
12 audits would come up, I was handling those audits. I had my
13 master's in tax at that point, had gone through the program
14 at Georgetown and so that was one of my duties at the
15 accounting firm as well.

16 Q What was the name of that firm?

17 A It was called Whalen, W-h-a-l-e-n, Barsky, B-a-r-s-k-y,
18 and Associates. And that was Bethesda, Maryland.

19 Q How long did you work at Whalen?

20 A About two, two and a half years.

21 Q And then where did you go?

22 A I had an offer to join another small CPA firm in
23 Bethesda, Maryland and was offered and opportunity to start
24 to build my own practice. And eventually that led to a
25 partnership that was called Klausner, K-l-a-u-s-n-e-r,

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1 Bartko, B-a-r-t-k-o, and Dubinsky. And I was a partner for
2 16 years, about 16 years at that public accounting firm.

3 Q And did its name change at all over those 16 years?

4 A It did. Mr. Bartko left the practice and then it was
5 just Mr. Klausner and myself. And it was Klausner Dubinsky
6 & Associates for the remainder of the time that I was with
7 Mr. Klausner.

8 Q So that 16 years was from roughly when to roughly when?

9 A January 1992 to April -- I believe it was April 10,
10 2008. I remember the day.

11 Q Okay. And what did you do in 2008?

12 A So in 2008 -- let me just clarify.

13 In 2006, I think it was December 2006 Mr. Klausner
14 and I split the practice. I kept my practice and my
15 clients; he took his clients. And I continued practicing as
16 a CPA at that point up until the April 10, 2008. That was
17 the point in which Duff & Phelps, the company I currently
18 work for, acquired my practice.

19 Q So in that 16-year, roughly 16-year period from 1992 to
20 2008, could you describe what responsibilities you had for
21 providing financial counseling to your clients.

22 A Sure. During that period, Your Honor, I had about 475
23 individual clients and I had about 150-to-175, depending on
24 the time period, businesses. Most of those were
25 closely-held businesses being owned by the individual

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1 clients that I was also advising.

2 Most of these were high-net-worth individuals. I
3 would say income probably north of half a million dollars a
4 year. And assets anywhere from half a million to -- I had
5 one individual that was tens of millions of dollars.

6 And what I would do for financial planning, so I
7 would do their tax work and do their tax compliance. As
8 part of that, as a CPA, I would do overall financial
9 planning for them, estate planning and retirement planning.
10 So I would help them look at their -- where they were going,
11 when did they want to retire, how long they were going to
12 work, and help them understand the financial kind of road
13 that they would need to take to get there.

14 In conjunction with that, during that period, I
15 would also work with them -- many of them at that point had
16 stockbrokers or investment advisors. I would work with them
17 to look at what their investment advisors and stockbrokers
18 were doing for them. And they would come to me as their
19 CPA, as their trusted advisor, and I would review that with
20 them on a fairly regular basis. At least -- probably two
21 times a year I would sit down with clients to do that.

22 THE COURT: So they would take what their
23 financial advisor told them and then come to you and say
24 does this sound right?

25 THE WITNESS: That's correct. That's correct.

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1 THE COURT: And pay both of you?

2 THE WITNESS: They would. Yes, Your Honor. Yes.

3 A At that time the investment advisor business was just
4 coming into being. There was still a model of using
5 stockbrokers. You know, some people had a level of comfort
6 that was higher with CPAs than just the stockbroker. The
7 stockbroker was making a commission on their sales. So from
8 a kind of bias standpoint.

9 There came a time, it was about 1999 where I sat
10 for the registered investment advisor Series 65 Uniform
11 Investment Advisor Examination. The market was changing.
12 Clients were saying to me, you're already helping us, you're
13 doing this. Why aren't you getting paid other than your
14 hourly rate? I'm paying a broker to do this. Why are we
15 paying both?

16 And the market started changing. There was a big
17 push by the American Institute of Certified Public
18 Accountants to have accountants get licensed as an
19 investment advisor. There was a big push in the industry.
20 And so I followed along with that and I went and got
21 licensed. I took the examination. I got licensed by the
22 State of Maryland. And at that point I was then able to get
23 paid not only for the hourly advice that I was giving them,
24 because that was kind of wrapped into the overall client
25 relationship, but now I could charge a fee, what we call a

1 wrap fee, as a percentage of the assets that were under
2 management.

3 So we started transitioning a lot of clients away
4 from traditional brokers such as Merrill Lynch and other
5 houses to our platform. We were trading through Charles
6 Schwab Institutional. I was working for a company called
7 Sol Capital Management. And they had -- they were a
8 registered investment advisor shop. I was a registered
9 investment advisor representative, that's the way the Series
10 65 license works. And then I was able to then counsel those
11 clients, talk to them about individual stocks, equities,
12 bonds, mutual funds, the whole gamut of investments, private
13 placement type investments, private equity investments,
14 whatever it was and I could get paid on doing that for them.

15 And so I started doing that. I had a practice
16 of -- over the period from '99 to probably 2000 -- the end
17 of 2007, about a hundred clients. Total assets under
18 management, it varied, but I would say about \$150 million.
19 And had, again, it was focused on high net worth
20 individuals. So these were individuals that came to me as
21 part of my accounting practice. I wasn't out marketing
22 separately to get these clients. They already trusted me.
23 And in that capacity they were high net worth individuals.

24 The vast majority of these accounts were
25 discretionary accounts. I know there's been some talk, Your

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1 Honor, this whole week about that, and I won't take too much
2 of the Court's time. But as a discretionary account they
3 would sign the document authorizing me, as their investment
4 advisor, to trade on their behalf. I didn't need to pick up
5 the phone and call them every time I wanted to do that. It
6 was a blanket authorization. And what we would do with
7 clients, just within that framework, they would give us a
8 basic framework of their asset allocation, their goals,
9 their retirement goals, their financial goals. And within
10 that spectrum then I was able to operate and invest without
11 calling them.

12 I did have several clients that didn't have
13 discretionary accounts. They had regular accounts where
14 before we made a move, pick up the phone, get their
15 permission, explain why we were doing it. Not that they
16 distrusted us, they were just some people liked that kind of
17 control to keep their thumb on things.

18 THE COURT: How painful is this for a government
19 employee to listen to, huh?

20 MS. NESTOR: Your Honor, may I just ask a favor.
21 I'm having a hard time. Just slow down just a tiny bit. I
22 speak quickly, I know.

23 THE COURT: Oh, all right. Yes, slow down a
24 little bit.

25 THE WITNESS: I will, Your Honor.

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1 MS. NESTOR: Thank you. I really appreciate it.

2 Q So, Mr. Dubinsky, why did the vast majority of your
3 clients want you to do this on a discretionary basis rather
4 than a preapproval basis?

5 A The vast majority were busy business people. They ran
6 their own business. They were very busy. They knew their
7 business. They didn't know the investment business. They
8 trusted me as their CPA. Many of them using me for years.
9 And so they wanted me to handle that in a trusted capacity.
10 I had a duty as a licensed investment advisor, there's a
11 duty you owe to your clients, which I fulfilled. And so
12 they would come to me looking for that trust and integrity
13 and the honesty of investing for them.

14 Q Do you have any lawyer clients?

15 A I had a lot of lawyer clients. Washington, D.C., being
16 a big area of lawyers, I would say my practice, probably at
17 least 25-to-30 percent were lawyers.

18 Q Now, I'm sure government counsel has been doing
19 research on the Internet. Were there some glitches with the
20 registration of your financial advisor registration in some
21 way and can you explain that?

22 A Sure. So, Your Honor, I was originally licensed in
23 1999 by the State of Maryland. It was around I think the
24 end of 2004, maybe the beginning of 2005 I got a notice from
25 the State of Maryland that my registration had lapsed. I

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1 was scratching my head. The company that I was with -- the
2 company I was with had a compliance, outside compliance
3 company that would do the compliance for them. And that
4 company was supposed to send in a hundred dollars to the
5 State of Maryland to keep my license active and they didn't.
6 And the upshot of that was the State of Maryland forced me
7 to take the examination again, which was not fun. I passed.
8 I was not happy.

9 THE COURT: How many years later is that?

10 THE WITNESS: That was six years later, Your
11 Honor.

12 A The information was still the same on exam, but,
13 nonetheless, you don't want to fail the exam. I studied and
14 had to go do that again for a hundred dollars that they
15 didn't pay.

16 And so the relicensing occurred in January -- I
17 believe it was January of 2005 with the State of Maryland.

18 And then, as I explained earlier, when Duff &
19 Phelps came to purchase my practice, Duff & Phelps has a
20 regulated side of the business. They have an investment
21 banking arm -- this is the company I work for now.

22 And as you know, there's a lot of regulatory red
23 tape with being licensed as an investment banker. This is
24 not what I was going to do at Duff & Phelps. I was in the
25 disputes. I am in the disputes investigations practice, and

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1 I'll explain that in a minute, and I opted to let the
2 license lapse. It was just going to be crazy regulatory red
3 tape, and I wasn't going to practice in that area just to
4 keep the license active, and I made a decision to let it go
5 and I said I would never go take the examination again.

6 Q So in that 16-year period where you've described having
7 responsibilities for giving clients advice about financial
8 matters and their investments, what kind of materials did
9 you review for your clients?

10 A So the types of materials I routinely reviewed were
11 brokerage statements. As I explained, when I got licensed
12 as a registered investment advisor representative, the
13 platform was through Charles Schwab Institutional. So
14 Charles Schwab Institutional had set up a program for
15 registered investment advisors similar to what we heard in
16 court with Ameriprise. These companies were going around
17 setting up platforms. That platform allowed two things.
18 Well, many things, but two things of importance here. One,
19 access to industry research. So I had access in that
20 capacity not only to my client's statements and
21 confirmations and trade, all of that, of course, but there
22 was a whole section of institutional research such as
23 analysts reports, sector reports.

24 Sector reports are very important, Your Honor.
25 They're a little bit different than an analyst report. An

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1 analyst report will usually look at a particular stock at a
2 company. They may have some industry information embedded
3 in the analyst report, but a sector report looks at the
4 industry as a sector. And that becomes very important when
5 you're investing for clients based on sector analysis and
6 where things are moving in the market.

7 So we had access to very detailed information on
8 sector analysis. We had information on the companies from
9 the SEC. So the companies, all the SEC filings, the 10-K,
10 the 8-Ks, quarterly filings, things of that nature that
11 companies, when they make a material change, have to file
12 with the SEC. We had access to all of that.

13 There was a wide variety of -- there were
14 background reports on principals of the companies that were
15 in there. And that was at Charles Schwab Institutional.
16 There was another platform, I believe it was called Fortress
17 Investments at that time. Fortress Investments is up here
18 in New York. And Fortress investments allowed, they were
19 selling another service that allowed for investment advisors
20 to purchase into that service for their own research. So we
21 had a wide variety of different research reports and areas
22 to go look at.

23 So those were the types of things that I looked at
24 on a regular basis. In addition to those things, obviously,
25 news stories. The Wall Street Journal, I had a daily

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1 subscription to the Wall Street Journal, would read through
2 that. Barron's Financial, had a subscription to that and
3 would read through Barron's. And I think the Financial
4 Times were the three newspapers that I subscribed to for
5 that purpose.

6 Q And how did your CPA training and experience and your
7 masters in tax assist you in reviewing those kinds of
8 information?

9 A Both of those trainings, Your Honor, CPA and going
10 through a program at Georgetown and the masters, teach you
11 to think analytically, teach you to be critical, to look at
12 facts, to look at information. And that experience I
13 brought to the table for my clients. That's what they were
14 looking for. They wanted an independent person. I wasn't
15 getting paid on the trades. The trades were going through
16 Schwab. And so all of that background and information
17 helped me to counsel clients, to help them invest, to help
18 them build for their future and their retirements.

19 Q So in that 16-year period, were you in the business of
20 giving clients advice about particular securities, I guess,
21 forgive advice. Were you in the business of actually buying
22 and selling individual investments for your clients for whom
23 you had discretionary trading through?

24 A I was. Technically Charles Schwab Institutional
25 executed the trades at our direction because I was not a

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1 broker. I didn't have a Series 7 license. But I would work
2 with the clients determining what that mix would look like.
3 If they came to me with a recommendation, I'd look at that.
4 I would make recommendations. And then based on what we
5 were doing, we would make the trade through Charles Schwab.

6 Q Okay. And so before you made a decision about buying a
7 particular security or selling a particular security on
8 behalf of a client for whom you had discretionary authority,
9 what steps would you take?

10 A It was a fairly rigorous analytical process of due
11 diligence. Due diligence looking at information that I
12 could get, both publicly available or through a subscription
13 service, which, again, is publicly available but I had to
14 pay for that or through my platform at Charles Schwab. And
15 look at that research, analyze it.

16 Being a certified public accountant, my training
17 was on the balance sheets of companies, income statements,
18 where they had been, but, more importantly, where was that
19 company going. Recall, markets don't trade on yesterday's
20 information. They trade on what's going to happen in the
21 future. If a company lost money last year, it's a data
22 point, but it's looking at where you're going in the future.
23 Where does that market think that stock is going over
24 overall the market.

25 So I would analyze the reports, I would read them.

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1 There was a lot of reading that went on. I would rely on
2 research that I obtained, and then I would make
3 recommendations.

4 Q When you talk about making recommendations, if you had
5 discretionary authority, would you actually make a
6 recommendation or just execute?

7 A It's a fair point. In the beginning of the year I
8 would sit down with clients and go through what their goals
9 were at a very high level. I would then go through talking
10 been an asset allocation, how much in equities we were going
11 to put in, how much in bonds, fixed income, how much in a
12 mutual fund. Then I would break that down into different
13 sectors, whether it's international, U.S., large cap --

14 THE COURT: Excuse me one second.

15 (Brief pause.)

16 THE COURT: Go ahead.

17 A I would go through that process and then I would set
18 out to develop what we were going to invest in. I would not
19 then go back to the client and ask for permission. I
20 already had the permission being a discretionary account,
21 but I would always sit down, again, on this global basis and
22 figure out where I was going, was it in line with the
23 client. Is that where they wanted to go?

24 My clients didn't pick individual stocks.
25 Sometimes they'd come to me and say I heard about a stock,

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1 but it was my job because I was getting paid to develop that
2 portfolio for them and decide which stocks to purchase for
3 them, which mutual funds. If I was buying a mutual fund,
4 for instance, what stocks were in that mutual fund. The
5 mutual funds will list usually the top 20 holdings. Then I
6 would do analysis of that mutual fund on the individual
7 stocks within the mutual fund. Sometimes mutual funds, one
8 would weight a certain stock like Apple heavier than another
9 mutual fund. If you already had Apple in the portfolio, I
10 didn't want to overlap that. That all fell on me. That's
11 what I was getting paid to do.

12 Q And you mentioned annual meetings with clients. I
13 think you heard testimony that the Schulmans were meeting
14 with Tibor Klein several times a year. How often would you
15 meet with your individual clients?

16 A I would say on average twice a year. Some clients meet
17 quarterly. They wanted to see how they were doing. Other
18 clients met annually, and I had some clients that never met.
19 I would always send out, either a phone call or an email
20 saying, it's that time of year again. Do you want to come
21 in and sit down? Some clients just didn't care. They
22 trusted me and they wouldn't come in and didn't sit down
23 with me. But I would say on average probably about twice a
24 year.

25 Q So we're just talking about your personal experience.

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1 You'd agree with me, wouldn't you, that your experience with
2 close to a hundred high-net-worth folks that you were
3 working with was not a double blind statistical study,
4 right?

5 A No. These were my clients that I had for many years.

6 Q Your experience?

7 A That's correct.

8 Q What kinds -- and understanding your practice may have
9 been different than Mr. Klein's, which is at issue here, but
10 what kind of paper would you prepare to show your clients at
11 these meetings?

12 A So understand -- let me think about how to explain
13 this. Charles Schwab Institutional would produce monthly
14 statements. On my clients.

15 Q Similar to stuff we've seen from Pershing, right?

16 A Very similar. The industry was very similar. These
17 statements could run 15 to 30, 40 pages long. My clients
18 didn't understand that. It was too lengthy to go through.

19 There was a push in the industry to take that
20 information and I got an electronic feed from Schwab on all
21 of that information, and we had a reporting package that it
22 went into. And in that reporting package it would generate
23 pie charts, graphs, things that, like the old saying, a
24 picture is worth a thousand words. People understand
25 pictures. If I show a graph of a line going this way down,

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1 (indicating) people understand that's usually not good.

2 Q You may be losing that client.

3 A I may be losing that client.

4 Q Did you actually ever lose a client?

5 A I mean, I lost tax clients so I probably did along the
6 way. People move, people -- I had people that died,
7 definitely had people that died.

8 But, anyway, I would take this other reporting
9 package -- and that was usually distilled down into about
10 eight pages. Front page being two or three graphs,
11 overview, and it got more detailed as you went through that.
12 That was the document that I sat down with my clients and
13 went through and would explain to them, here's where you
14 were. Here's the starting point, the beginning of last
15 year. Here's where you are this year. Here's what we did.

16 And there was an important other piece on that, we
17 would benchmark it, something called benchmarking. So I
18 would benchmark my performance from my clients against could
19 be the S&P 500, the Russell 2000. There were different
20 indices that I would benchmark it against to show them,
21 well, if I'm doing 6 percent and a Russell 2000 is doing 12,
22 they're going to ask me what's going on, right? Why aren't
23 you performing like this? And it was all allocated based on
24 the types of investments and where they fit into that
25 structure. That was the benchmark for that particular set

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1 of investments that I would then explain that benchmarking
2 to them.

3 Q And how many pages back in those presentation packages
4 you presented would you have to turn before you got to
5 information about individual stocks you had bought that
6 year?

7 A Probably about page 6 or seven. Page 8 was the fees,
8 that always, by design, went on the last page. But it was
9 usually 6 or 7 would list the actual individual
10 transactions, the buys, the sells of the year, and that
11 would usually be towards the end of that package.

12 Q Folks are different. Your clients were different?

13 A I had a wide variety of clients, yes.

14 Q In your experience, how many times did you get all the
15 way back to pages 6 and 7 where you start talking about
16 individual shocks?

17 A It happened on occasion. Again, I had some clients
18 that were very anal, would go through things. I would say
19 the vast majority of the time we never even got close to
20 that. It was more of a discussion on, okay, you know, the
21 markets did 8 percent this year. We did 9 and a half.
22 Great. What's next year going to look like? Everybody was
23 always focused on next year. Great what happened this year.
24 I mean, if it was a problem, and some years there would be
25 problems, the markets were down markets and you tried to

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1 protect the clients in a down market. That was part of my
2 job as an investment advisor, but they quickly wanted to
3 talk about, okay, what are you going to do for me for the
4 next year going forward? How are we going to change this
5 up, and that's where most of the time sitting with clients
6 was spent.

7 Q Did that Schwab platform generate what are called
8 confirmations or trade confirmations?

9 A They did. They generated two sets, one for the client,
10 and one for the investment advisor.

11 Q And would the ones for the client get mailed to the
12 clients' homes?

13 A They could either be mailed or there was an option
14 starting in about 2001 for electronic receipt by the client
15 of those. You had to opt into that to get those.

16 Q And so can you estimate for me if you got close to a
17 hundred clients and you're executing trades, how many trade
18 confirmations got sent to your clients in those 16 years?

19 A I wouldn't begin to -- a lot. Let's put it that way, a
20 lot.

21 Q How often do you recall getting a phone call from a
22 client, hey, I just saw a trade confirmation? What
23 happened?

24 A A handful of times maybe over 16 years or the time
25 that, you know, I was investment advisor. Maybe a handful

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1 of times.

2 Q Okay. In addition to your experience about your
3 particular clients' review of their individual trade
4 confirmations and individual stocks in their portfolio, did
5 you do some research to see if there was any data out there
6 that was consistent with your personal experience?

7 A I did.

8 Q What did you do?

9 A I started where everybody usually starts and hit Google
10 and went on Google and started to see are there any sort of
11 research reports on people understanding their brokerage
12 statements, people -- what are the patterns, if you will.

13 If you recall, I testified during that time
14 period, back in the early 2000s, there was a big push in the
15 industry to simplify the reporting. Schwab, others knew
16 that clients just didn't understand these complicated
17 documents. They were continually trying to simplify things.
18 And they would come to us as investment advisors and run
19 focus groups and talk to them about that.

20 And the research, in this case, one of the things
21 I found was a FINRA, the Financial Industry Regulatory
22 Authority who Your Honor heard, there was a witness from
23 FINRA the other day, put out a report in 2016, very recent,
24 it was an update of a report that they had done several
25 years earlier on investor behaviors.

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1 FINRA -- and we can go through it, but FINRA
2 commissioned some researchers on their behalf, paid for by
3 the industry to go out and research investor behaviors. And
4 in that study there were statistics about how many people
5 skim their statements, how many people read them thoroughly,
6 and those are statistics that, in general, support my
7 findings.

8 Q Are you familiar with FINRA?

9 A I am very familiar with FINRA.

10 Q How?

11 A I have worked on two, if not three occasions, as an
12 expert witness for FINRA's Department of Enforcement.

13 Q In other words, they hired you?

14 A Yes, sir, they hired me.

15 Q And for what?

16 A The most recent case was in 2015. I was hired on a --
17 there was an investment advisor here in New York that was
18 under disciplinary investigation for improperly allocating a
19 bulk purchase of Facebook shares and then improperly
20 allocating those to clients and then basically cheating the
21 clients out of their proper share when Facebook went public.

22 I was hired by the Department of Enforcement as an
23 expert witness. I testified for them in that proceeding
24 here in New York, in Manhattan. And my understanding was
25 that that individual was barred for life. That was his I

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1 think second or third strike with FINRA and he was barred
2 for life from practicing.

3 Q What kind of proceeding was this?

4 A It was a FINRA arbitration proceeding. So it's, you
5 know, they had court reporters similar to this, arbitration.

6 When you're a broker or an investment advisor in
7 the industry, one of the things you agree to is to be
8 subject to the disciplinary proceedings of FINRA. They are
9 the self-regulatory organization for the entire brokerage
10 industry. They're overseen by the Securities and Exchange
11 commission. And so, as such, you agree that if there's a
12 disciplinary action brought, it will be heard by a FINRA
13 arbitration panel. And FINRA has hearing officers. Some
14 work for FINRA. It's a mix. Some work for FINRA and some
15 are from the industry to get a mix so there's a bias on the
16 panel, and then that's where FINRA brings their actions
17 against bad actors in the industry.

18 Q And FINRA was asking you to testify as an expert in
19 evaluating a financial advisor's conduct toward his clients?

20 A Yes, sir, that is correct.

21 Q And was the adequacy of the research that that
22 financial advisor had done one of the subjects that FINRA
23 hired you to be an expert for?

24 A It was.

25 Q And did you give opinion testimony about the quality of

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1 the research that investment advisor had done with respect
2 to a particular security?

3 A There was basically no research done. This individual
4 had gone around. They were speculating that Facebook would
5 go public. There was a lot of rumors in the marketplace.
6 And he was able to convince people that held stock at
7 Facebook, restricted stock that could not be freely traded
8 because they weren't public, to put their stock into a
9 partnership. They set up a series of partnerships, and then
10 he sold those partnership interests to investors and that
11 became the issue of the proceeding that the way it was done,
12 from the very beginning there was allegations of fraud in
13 the setting up of the partnership, in the series trusts that
14 were set up, how the accounting was done, how the investing
15 was done, and I testified on those issues.

16 Q Did FINRA ask you to serve as an expert in another
17 matter?

18 A They did. I'd have to look at the date, but several
19 years earlier I was hired again by the Department of
20 Enforcement for FINRA. Both of these cases emanated out of
21 their enforcement division in Washington, D.C. That case
22 was heard in Pennsylvania. Again, arbitration panel. It
23 was a disciplinary proceeding. That --

24 Q Disciplinary proceeding related to the conduct of who?

25 A The conduct of a broker dealer and an investment

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1 advisor. They were basically two separate companies but the
2 same principals.

3 Q So let me short circuit this if I can.

4 Were you hired by FINRA to provide expert advice
5 about the conduct of an investment advisor toward his
6 clients?

7 A Yes, I was.

8 Q Have you always been hired by other government
9 enforcement agencies?

10 A I have.

11 Q How many?

12 A How many times or how many agencies?

13 Q Good question.

14 Before we do that, while you were working as a
15 financial advisor in that 16-year period, eight of which you
16 mentioned you were registered as a financial advisor, did
17 you also branch out a little?

18 A I did.

19 Q Did you become a certified fraud examiner?

20 A I did.

21 Q What is a certified fraud examiner?

22 A A certified fraud examiner is a professional
23 designation that I obtained through a proctored examination
24 and training, education and training. It's issued by the
25 Association of Certified Fraud Examiners in Austin, Texas.

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1 It's the largest antifraud professional organization in the
2 world currently with about 72,000 members worldwide.

3 Q Do you know who started it?

4 A It was started by a man, Joseph Wells, he was a former
5 FBI agent out of Washington, D.C., and he then moved to
6 Texas. And when he retired from the FBI he started this
7 organization.

8 Q And are current law enforcement members of that
9 organization?

10 A Yes. When it was first started in the 80s it was
11 predominantly law enforcement because that's where Mr. Wells
12 came from, from the FBI. As I got involved in the
13 organization, I was making a push to get more people that
14 weren't law enforcement involved. I thought it made sense
15 for the organization. Today it's still predominantly law
16 enforcement, but it does have non-law enforcement members.

17 Q How many members does it have?

18 A About 72,000 worldwide.

19 Q Have you served as a leader of that organization?

20 A I did. In 2014 I was elected to the Board of Regents.
21 That's the equivalent, Your Honor, of the Board of Directors
22 of the organization. And in 2015 I was elected as the
23 Chairman of the board.

24 Q And have you given training to FBI agents in fraud
25 examination?

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1 A I have. I conducted a training to -- it was a national
2 training to FBI agents in, of all places, Your Honor, Las
3 Vegas. And it was a training on data mining and data
4 analysis using software to go through large datasets and
5 find patterns when you're doing a fraud investigation.

6 Q And is that data mining the same kind of skill that you
7 used as a financial advisor in picking stocks?

8 A I never thought of it in that sense. It's an
9 analytical skill that you use, so I would say yes.

10 Q You got any other professional certifications?

11 A There's a few others. Let me run through those quickly
12 for the Court's time here. I have a Certified Valuation
13 Analyst issued by the National Association of Certified
14 Valuation Analysts.

15 Your Honor, that's, again, a proctored
16 examination, training, education to value nonpublic
17 companies, so closely-held companies. It's focused
18 primarily on valuation and finance.

19 I have a master analyst in financial forensics.
20 So unlike the certified fraud examiner that focuses directly
21 on fraud examinations, the master analyst and financial
22 forensics is a broader scope that looks at all types of
23 financial forensics. And a lot of the training in that
24 helps me in cases that I work as a damage expert, for
25 instance.

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1 If two companies have a breach of contract claim,
2 one suing the other in a civil case, what are the damages?
3 It comes down to the money. That training focused on that.

4 We talked about the registered investment advisor.
5 I was a commercial arbitrator on the AAA panel. I went
6 through all their training and went through the Commercial
7 Arbitrator 1 and 2 training, was put on the panel. I was
8 one of about 25 people in the country put on the panel that
9 was a CPA. At that time when I got it the AAA thought there
10 would be a benefit to having people with financial
11 backgrounds on panels because many times the lawyers didn't
12 have a financial background.

13 Q I'd speak to that.

14 A And so I went through all this training. It sounded
15 great. Only to find out that people don't want to hire CPAs
16 on panels. They want lawyers or former judges on panels.
17 So I, again, let that lapse. There was no sense in
18 continuing with that ongoing payment and training for that.

19 THE COURT: Let me just interrupt.

20 I think we've covered his qualifications. I want
21 to know if the government wants to voir dire on the
22 qualifications.

23 MR. PITLUCK: Your Honor, we'd like to voir dire
24 or ask some questions about some of the specifics, not
25 necessarily about the certified fraud examiner, some of the

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1 specifics of the Mr. Dubinsky's investment advisory
2 experience. But I think that's more relevant to the actual
3 issues here.

4 THE COURT: Okay. So then Mr. Mead can go
5 ahead --

6 MR. PITLUCK: And I don't need to see his
7 certificate as a certified fraud examiner. He seems very
8 credible. I think we can move on to the substance of the
9 testimony.

10 THE COURT: So Mr. Mead can offer him as an
11 expert?

12 MR. PITLUCK: Yeah. Well, I mean, obviously, Your
13 Honor, we have some questions on the specific issues to
14 which he's advised, some of our questions are going to go to
15 that issue, not on his general qualifications.

16 THE COURT: I know, but I'm sure -- go ahead.

17 MR. MEAD: So may I suggest, I mean, I want to
18 offer him and I would ask, you know, the background
19 question, what does all of this mean that you can tell a
20 jury that they might not know from their common experience.
21 I don't know if you want to hear that answer, but that's
22 part of the qualification process.

23 THE COURT: Well, go ahead.

24 MR. PITLUCK: I'd like to hear that answer too.

25 THE COURT: Okay.

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1 Q So in terms of doing research on publicly available
2 information about King -- can I ask one more thing about
3 qualifications? Forgive me.

4 So you branched out. You become an expert.
5 Primarily you're in the expert witness business, is that
6 fair to say now?

7 A I would say half my practice is providing expert
8 witness testimony. The other half is conducting fraud
9 investigations. I do that regularly.

10 Q And have you -- King is a pharmaceutical stock, right?

11 A It is.

12 Q And you did research related to King's position in the
13 pharmaceutical world and potential for takeover by another
14 pharmaceutical company?

15 A Correct.

16 Q In your capacity as an expert witness, have you had any
17 experience in the pharmaceutical field?

18 A I have. I worked on a case for Actavis, which is a
19 very large pharmaceutical company. I've worked on cases for
20 DuPont as well. Those are the two that come to mind.

21 Q And, again, without breaching confidentiality, do you
22 remember whether you testified publicly in either of those?

23 A I don't believe. I think they both settled. There was
24 a DuPont case that I did testify on in federal court that
25 didn't deal with pharmaceuticals. That dealt with Corian

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1 countertops.

2 Q Fair enough. But without going into detail that might
3 breach a confidentiality order, was the nature of your
4 testimony related to valuation of particular products in
5 connection with patent lawsuits?

6 A It was, yes.

7 Q And so to do that, did you have to look at the
8 pharmaceutical industries as a whole and projected earnings
9 from pharmaceutical product?

10 A I had to look at the company, the industry, the sector
11 of the industry, yes, all of that.

12 Q So now that we've got that.

13 Understanding that you've been asked to give
14 opinions in two areas. Let me start with the first. The
15 first area is what publicly available information there was
16 in August 16, 2010 that might lead someone to consider
17 investing in stock of King Pharmaceutical --

18 A Correct.

19 Q -- roughly?

20 And so what does all your training and experience
21 give you to help you do that analysis that a jury of
22 ordinary lay people wouldn't have?

23 A Well, I think a couple factors. One, as I've
24 explained, I've done that professionally so I've done --
25 conducted research, I've advised clients and I think that's

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1 very important. I don't know the composition of the jury,
2 but my experience is most lay people are not very well
3 versed in financial matters, much less in doing industry
4 specific research on equities on a particular stock or an
5 industry. There may well be one or two people, I don't
6 know.

7 Q That's fair.

8 A So I think that's number one.

9 Number two, the research that I did, Your Honor,
10 in my capacity as both a CPA and an investment advisor, was
11 research that I was trained to do. I went into subscription
12 services that others may not have. These are detailed
13 analyst's reports. Many of them, as if you have looked or
14 will look, have pages of financial information; have
15 technical jargon on them. There's a lot of words that
16 people, lay people, would never I don't think would
17 understand in my experience. So I think assisting the jury
18 in explaining what those concepts are, what those terms mean
19 I think would be very helpful, and I think my experience
20 bears directly upon that.

21 Those are the things that come to mind in that
22 regard.

23 Q How about opinion number two, you know, just the extent
24 to which high-net-worth folks who have hired financial
25 advisors pay attention to individual stock pay.

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1 THE COURT: Honestly, don't waste your time on
2 that. I'm not going to permit it from the expert.

3 MR. MEAD: Well, I'd like to make my record, if I
4 could.

5 THE COURT: All right. Go ahead.

6 Q So what --

7 THE COURT: I mean, we don't need an expert. I
8 mean, it's common sense. You know, we've already heard from
9 Mrs. Schulman. You know, people have experiences with what
10 envelopes they open and what they don't. I'm just trying to
11 move this along.

12 MR. MEAD: So is the government --

13 THE COURT: Go ahead. Make your record.

14 MR. MEAD: Thank you.

15 One way to make my record is to ask the government
16 do they intend to argue that the Schulmans actually knew
17 about the trades in King because confirmations and
18 statements were mailed to their home? They introduced
19 evidence to that extent. I need to know if that's going to
20 be a contention of the government.

21 MS. NESTOR: Whether or not we actually argue
22 that, Your Honor, does not matter for purposes of this
23 testimony. It's still not expert testimony.

24 THE COURT: Yeah, that's my view.

25 Go ahead. Make your record. Make it quickly so

1 we can get out of here before Monday.

2 Q So what experience have you had in terms of your
3 training and life experience that you believe a jury does
4 not have about the way high-net-worth folks review
5 individual stock picks made by financial advisors they hire
6 to trade on a discretionary basis?

7 A Well, high-net-worth individuals are different than
8 ordinary people. They have different patterns and
9 behaviors. The fact that I've counseled directly for many
10 years high-net-worth individuals that had, and I think this
11 is an important distinction, discretionary trading accounts
12 because that's different than let me just open an account at
13 Charles Schwab or E-Trade, get my statement. And I don't
14 think this is about opening the statement or not. It's
15 about whether people understand the information and whether
16 they fully read the statement. Or, as a discretionary
17 accountholder with an investment advisor, they're relying on
18 the investment advisor to do that for them, to explain those
19 investments.

20 And I think that's a big difference. I think the
21 jury, again, I don't know the composition of the jury, what
22 their backgrounds are, but I think this goes beyond, at
23 least in my mind, beyond just opening an envelope or not.

24 In the FINRA study that I referenced, it talks
25 about -- it says that people, I think it was 93 percent open

1 it and skim it. The more important statistics are the
2 statistics of people who fully read their brokerage
3 statements and then understand them. And I think that's the
4 distinction that I can bring to the jury so they can have a
5 better understanding of the issues that are present in that
6 regard.

7 Q In terms of the FINRA report itself, how did FINRA
8 prepare the information that went into the report?

9 A They went out and did a study. They surveyed
10 individual investors out in the marketplace, and it's
11 interesting in that study, there's a distinction between
12 high-net-worth individuals and others. And they break down
13 statistics because they now and the study showed
14 high-net-worth individuals have different behavior patterns
15 when it comes to investing, when it comes to dealing with
16 their brokers. The study goes through their backgrounds
17 with brokers and investment advisors, their attitudes
18 towards fees. This is commissioned by the industry, by the
19 very industry that governs the brokerage industry.

20 (Continued on the following page.)

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1 MR. MEAD: Your Honor, should we let the Government
2 voir dire with respect to qualifications?

3 MR. PITLUCK: Your Honor, I guess it depends. If
4 you'd like me to voir dire on the envelope statements, I have
5 a lot of questions about practices and the FINRA study. If
6 the Court wants to hear that, I'm happy to do it, but it
7 sounds like Your Honor's made a choice.

8 THE COURT: I really don't need to hear it. I've
9 made up my mind.

10 MR. PITLUCK: Can I just ask a few questions?

11 THE COURT: Yes.

12 MR. PITLUCK: I just want to make sure I have
13 everything straight, Mr. Dubinsky. You were going pretty fast
14 at the beginning.

15 THE WITNESS: Sure.

16 VOIR DIRE

17 BY MR. PITLUCK:

18 Q You said that in 1999, you were working as a CPA
19 primarily, correct?

20 A That's correct.

21 Q And you had -- and then you were helping people with
22 advisory planning and decided to go back and actually make
23 some money on it; is that right?

24 A Correct. The industry was changing. Yes, that's
25 correct.

1 Q I'm sorry. I'm summarizing here. But definitely correct
2 me if I'm wrong.

3 And in 1999, you went and got your investment
4 advisor license and had about a hundred clients that you said
5 you operated as investment advisor for, correct?

6 A I think I said over the period of time there were about a
7 hundred clients, that's correct.

8 Q And that ramped up to a peak of a hundred?

9 A That's correct.

10 Q How long did that take?

11 A I would say probably about two to three years.

12 Q And then did it remain at a hundred for the next five or
13 six, or did it go up and down?

14 A There came a point where I sold the practice and I then
15 started up a second practice. So the first practice that I
16 sold, those clients I couldn't go near. You know, there was
17 an agreement that I couldn't go near those. So I had to get
18 new clients.

19 Q Yeah.

20 A And so that was probably around 2004 time period.

21 Q Okay.

22 A And then it kind of ramped up again from there, probably
23 never to the level of a hundred at that point.

24 Q So in about 2004, you sold your practice, had a
25 non-compete, couldn't go near them, and then you ramped back

1 up again?

2 A Correct.

3 Q So when you said a hundred clients with about 150 million
4 under management, that was kind of the peak?

5 A Correct.

6 Q But that wasn't the whole time that you were practicing
7 in investments?

8 A No, that is correct.

9 Q And during that time, did you continue your CPA business?

10 A Yes, yes.

11 Q With more clients than you had as investment advisory
12 clients?

13 A Yes.

14 Q And during that time, I'm not going to beat around the
15 bush, you were also testifying as an expert witness a great
16 deal; is that correct?

17 A That is correct.

18 Q Sounds like a very busy practice?

19 A It was, yes.

20 Q Approximately what percentage of your practice between
21 1999 and 2007 was focused on this investment advisory
22 business?

23 A Percentage of time?

24 Q Percentage of time, percentage of revenue. Feel free
25 to -- you're very descriptive. Please break it down however

1 you want.

2 A I would say percentage of revenue is maybe 20 percent of
3 revenue.

4 Q How about time?

5 A Time, boy, probably similar. I mean, it might have
6 varied because, again, in some capacity I was meeting with
7 clients at the same time doing their taxes and going over the
8 investments, but I would say roughly that.

9 Q Okay. And before that, you said you were advising people
10 just as a CPA and then you mentioned that it wasn't really
11 paying off.

12 About how much percent of your time was helping
13 people with investment advice at that time?

14 A Yeah, I don't think I said -- I'm sorry, your question
15 again.

16 Q I'm sorry, I'm paraphrasing. The record isn't going to
17 reflect that we're both smiling.

18 Approximately how much of your time was investment
19 advisory related before you became an investment advisor?

20 A Probably 10 to 15 percent.

21 Q And you had -- during this time, did you have help with
22 your advisory business, analysts and so forth?

23 A Which time period?

24 Q After 1999 when you became an investment advisor.

25 A Yes, we did.

Dubinsky - Voir Dire / Pitluck

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1 Q And more junior accountants to help you?

2 A Yes.

3 Q Now, you mentioned, I want to make sure I understand, you
4 said high net worth.

5 What's your definition of high net worth?

6 A It's changed over the years. I would say typically in my
7 mind I was always thinking of about \$250,000 of earnings per
8 year and above. That's typically what the industry looks at.
9 The SEC I think uses that same benchmark rule.

10 Q And you testified that the vast majority of your clients
11 were discretionary?

12 A Correct.

13 Q Can you try to quantify that a little bit more, please?
14 What constitutes vast majority?

15 A I would say probably in excess of 90 to 95 percent.

16 Q Throughout the time period including when you had a
17 hundred clients?

18 A Yeah. Well, just so the record's clear, the time period
19 that I was registered as an investment advisor.

20 Q Yes.

21 A Yes.

22 Q Between 1999 and 2007, you testified a moment ago your
23 practice went up and down and it reached a hundred at its
24 peak, correct?

25 A Correct.

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1 Q Did that percentage change at any point?

2 A The 90 to 95 percent?

3 Q Yes.

4 A No. So, to explain, the standard was the discretionary
5 account. That was way that the practice was set up. If they
6 didn't want it, they would basically opt out, and that's where
7 I think I testified that maybe a handful of clients had a
8 non-discretionary account.

9 MR. PITLUCK: I think that's all I have for right
10 now, Judge.

11 MR. MEAD: Do you want me to go to substance of his
12 testimony?

13 THE COURT: Yes, I would like you to go to substance
14 in terms of the kinds of research a reasonable financial
15 advisor would do prior to recommending a particular stock and
16 the type of information about King that would have been
17 available to a financial advisor engaging in that sort of
18 research in August of 2010.

19 MR. MEAD: Okay. That's fair.

20 THE COURT: Okay?

21 MR. MEAD: Absolutely.

22 THE COURT: So I've narrowed it.

23 MR. MEAD: Okay.

24

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1 DIRECT EXAMINATION (continued)

2 BY MR. MEAD:

3 Q So, Your Honor's first question, I believe, was the kinds
4 of information that an investment advisor --

5 MR. MEAD: Your Honor, my client is --

6 THE COURT: It's fine.

7 MR. MEAD: He needs to go to the restroom. Can he
8 be excused for this?

9 THE COURT: Yes.

10 MR. PITLUCK: Judge, could we take literally three
11 minutes?

12 THE COURT: An equal opportunity restroom break.

13 MR. PITLUCK: There's no jury, so we can be really
14 fast.

15 THE COURT: Yes.

16 (Recess taken.)

17 THE COURT: Okay. Go ahead.

18 BY MR. MEAD:

19 Q So, I think Her Honor's question just before we broke was
20 what kinds of information did you look at that you believe in
21 your expert opinion an investment advisor would have looked at
22 before August 16, 2010, before making a decision about King's
23 stock or was there anything out there favorable, basically?

24 A Yes, there were analyst reports. These were analysts
25 that were covering the King stock in the marketplace. There

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1 were news articles, and there might have been a couple of blog
2 entries from a financial type of website out there. Those are
3 the types of things that I looked for and that I found.

4 Q Did you find kind of a core of positive articles about
5 King, kind of, in the summer, June, July, early August of
6 2010?

7 A I did. I think the earliest was around June of 2010
8 leading right up to I found one on the very day, August 16th,
9 which is the day of interest in this case, 2010.

10 MR. MEAD: Your Honor, would you like us to run
11 through some of the Power Point slides? I'll skip the ones
12 about his tasks and his conclusions, which I think you've
13 seen.

14 THE COURT: Sure.

15 MR. MEAD: If we could get the slide up to slide 5.

16 So, the Power Point itself is Defense Exhibit 38.

17 (The above-referred to exhibit was published.)

18 Q First, Mr. Dubinsky, Defense Exhibit 38 is based on --
19 I'm sorry, slide 6 of Defense Exhibit 38 is based on
20 Defendant's Exhibit 12.

21 MR. MEAD: So, Your Honor, the stack of documents we
22 gave you are the underlying documents summarized on the slide.

23 Q So, Defense Exhibit 12 is what, Mr. Dubinsky?

24 A So, Defense Exhibit 12 is an analyst report from Caris
25 and Company out of New York on King Pharmaceuticals. It's

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1 dated Tuesday, June 8th, 2010, and it's a pretty lengthy
2 analyst report, I think there's 18 pages to it, going through
3 why they are initiating coverage on it. You could see that up
4 in the upper right-hand corner, which means they're now
5 beginning to cover the stock. They believe something is
6 important enough to start coverage of the stock.

7 And what the screen is showing is on this date, when
8 they issued this, the stock over the left-hand market data is
9 trading at \$7.98 a share and their price target up in the
10 upper right is \$11. So that just computes, the simple math is
11 a 39 percent increase from 7.90 up to \$11. And they are
12 initiating coverage of King, KG, that's the trading symbol,
13 with an above average rating, meaning an \$11 price target. So
14 that's pretty favorable right on the face of this analyst
15 report. And of course then you have to say well, what else is
16 in this analyst report that becomes important.

17 Q So, if we could move to slide 6.

18 Is that another excerpt from the same Defense
19 Exhibit 12?

20 A It is.

21 So, again Tuesday June 8th, 2010, the highlight that
22 I did there was: KG's profile screams acquisition target,
23 quote/unquote. The rest of that line says: "A pipeline of
24 assets, significant commercial infrastructure and some
25 execution problems."

1 So, there's very, very positive, a little bit of
2 negative at the end of that sentence. But what they're
3 talking about is the pipeline of assets in a pharmaceutical
4 company are their drugs. That's the life of the pharma
5 company, the drugs that go through FDA approval, clinical
6 trials and eventually reach the marketplace, and then the drug
7 company could commercialize those drugs at that point. It's a
8 lot of heavy R and D that goes into it up to that point.

9 So this analyst company that's following this is
10 saying hey, there's a pipeline of assets, that's what they're
11 talking about, the drugs, and there's a lot of detail in this
12 report that talks about the different drugs. Significant
13 commercial infrastructure, which is very important. This is
14 not a start-up company. This is a company with the
15 infrastructure, legal, finance, the ability to get drugs to
16 market, the ability to go through the FDA trial process, and
17 that becomes very, very important for somebody looking to
18 acquire.

19 And then, as I said, they say "some execution
20 problems." Okay, they are having a little bit of problems
21 getting things to the marketplace.

22 But this is about two months, two-and-a-half months
23 before August 16th. This is information that's out in the
24 market, and this is a piece of information in the overall
25 total mix of information that is out there.

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1 Q Can I focus you on the last sentence, the excerpt on the
2 slide that reads: "As profits cash flow from the drug
3 business reach critical mass, in coming two to three years
4 divestitures could occur to unlock value."

5 Does that have any relevance to any testimony that
6 you heard as you attended trial?

7 A It does. What that's talking about is, as I said
8 earlier, businesses aren't valued on the past. They're valued
9 on the future, what is expected the company is to do. They're
10 talking about profits and cash flow. If they increase,
11 divestitures mean it could be a segment of the business, it
12 could be they sell off patents to the drugs, they could
13 license the patents, not sell them, they could license to
14 monetize those patents to the drugs. There's a lot of
15 different ways, to, quote/unquote, unlock the value held in a
16 corporate entity, and that's what they're talking about here.
17 That's what they're looking -- forward-looking type
18 projections.

19 Q Do you recall statements introduced by the Government
20 from Mr. Schulman's SEC testimony related to what
21 understanding of the types of potential deals that could have
22 been in play between King and Pfizer?

23 A Yes, I did.

24 Q What did he say?

25 A He was, again I'm paraphrasing, talking that he didn't

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1 know if in the context of an acquisition it would be the whole
2 company being acquired, a division of the company, a product
3 line, or an individual product, and that's what I recall that
4 testimony said.

5 Q How is this sentence consistent with that?

6 A It's very consistent. This is -- this is the way pharma
7 companies are valued, how they operate, and how they, quote,
8 unlock their value, how they get to the value of the company.

9 Q When we get to slide 7, this is another excerpt from the
10 same article, Defense Exhibit 12?

11 A It is. So, they're talking about 2011 is this big
12 pipeline year. That's kind of the heading. Then it says:
13 "Remoxy, FDA approvals next year plus oxycodone completing
14 phase 3 trials provide KG with a multiple shots on goal to
15 eventually dominate the \$5 billion plus opiate space."

16 So, what they're talking about again is the value of
17 the company is forward-looking. That's what investors, people
18 how they value companies forward. If the FDA approvals are
19 coming, that's what they're anticipating, that's a big
20 pipeline year because those can then be introduced into the
21 market and commercialized and that's where these companies
22 make their money. That's how they make their money. So
23 that's very, very positive and a very big statement there.

24 Q Can we move to slide 8? This is an excerpt of a
25 different report you looked at?

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1 A This is. This is from Collins Stewart, another analyst
2 here. I believe they're in New York on Madison Avenue. And
3 they're putting out an analyst report. I don't know what
4 defense exhibit, but it has --

5 MR. MEAD: It's Defense Exhibit 14, Your Honor, if
6 that helps you.

7 A I believe there's like 12 or 14 pages, a lot of
8 spreadsheets and analysis. And what they're saying, among
9 other things, that are interesting here. Now, this is August
10 9th, 2010, again a week before August 16th, 2010. Prices
11 trading at 8.79 a share. You can see that. Their target
12 price is \$15 a share.

13 Q How does that compare to the announced merger price
14 between King and Pfizer on October 12th, 2010?

15 A It's pretty close. I think it's above it by about 85
16 cents a share. And that represents -- what's important about
17 this is it's a 71 percent increase. That's a huge increase
18 for an analyst to be projecting here.

19 And what the heading is, or what the statement that
20 I looked at here was: "We are reiterating our buy rating at a
21 \$15 price target."

22 So in other words, they are bullish on the stock.
23 You hear that term a lot, whether you're bullish or bearish.
24 Bulls in the market's going well, bears kind of retreat and
25 don't invest. So they're bullish on this stock. They think

1 it's going to increase 71 percent and they are reiterating
2 their buy rating. In other words, telling people out there
3 hey, you should be buying this stock, something's good here.

4 Q And you had looked at one article, the one before from
5 June of 2010 that talked about a potential acquisition.

6 Does this article base its projections on a
7 potential acquisition?

8 A No, they don't explicitly state that. What they do is
9 they go through what's called a discounted cash flow analysis.
10 So they go through their financials and they're projecting out
11 what will happen, and because of that, they back into their
12 target price and it's predicated on these drugs going to
13 market. So they won't explicitly state that, but you can
14 infer easily from this that if that happens, and those drugs
15 are commercialized, it's a pretty valuable asset the company
16 has.

17 Q Are those cash flow projections at Dubinsky 39 of Defense
18 Exhibit 14?

19 A Yes, they're summarized at Dubinsky 35 and going to 36,
20 37, 38, 39, 40, 41. So this is all the financial analysis
21 that the analysts will go through and talk that's how they
22 basically back into their target price.

23 Q And in your work as a CPA, as a financial advisor, as an
24 expert witness on valuation, are you personally familiar, have
25 experience with these kinds of projections?

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1 A Every day. I mean, I've prepared them myself. I've
2 analyzed them. Yeah, I've spent a lot of time with
3 spreadsheets like this.

4 Q Okay.

5 A And doing valuations.

6 Q If we move to slide 9 on Defense Exhibit 15. So one
7 article that mentions potential acquisition from June 2010,
8 one article from August 2010 that does not.

9 How about this one, which is Defense Exhibit 15?
10 What's the date on this one?

11 A So, this one is August 10th, 2010, just one day later
12 than the previous one we saw. This is from a different
13 analyst call Cowen and Company. I believe they're here in New
14 York as well, they have offices here. So, it's interesting,
15 the headline, not even in red, let me read that: "Solid Q2
16 results and Remoxy MDA on track. Getting our numbers in
17 line."

18 The company has just recently had their Q2 earnings
19 call in the market to apprise investors of the results. This
20 analyst is saying that King posted solid Q2 results with total
21 revenues coming in 10 million above consensus, so that's
22 pretty good.

23 Q When did they release those new performance results that
24 exceeded expectations?

25 A It would have been after June 30th, 'cause that's the

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1 second quarter, and some time before this. I don't know
2 exactly, but somewhere in that time period. And they try to
3 get it out pretty quickly to the market to have those calls.

4 And what they're commenting here is this
5 outperformed the market by 30 percent plus and they say, I'll
6 read the second half of what's highlighted down there. It
7 says: "Based on our sum of the parts and DCF" - that stands
8 for discounted cash flow - "valuation analyses, we believe KG
9 shares can outperform the market by 30 percent plus over that
10 period."

11 So, this is talking about when you do a valuation,
12 many times you'll look at the overall company. Then you'll
13 drill down to the segment and even sometimes to the product
14 lines and the products because you have to -- you have to
15 project out, Your Honor, the sales, the projected sales from
16 these, and it's from the revenue. You roll that up, you
17 subtract the expenses, you get the income. That's what
18 investors are looking for. And it's the ending of that income
19 when you put it all back together, the sum of the parts, equal
20 the whole company, and that creates the value of the company.

21 So, that's what they've done here. They've looked
22 at the company. They dissected it. They've done their
23 valuation, and their conclusion on August 10th was
24 outperformed the market by 30 percent plus.

25 Q When we move to slide 10, does this same article

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1 explicitly mention the possibility of an acquisition or
2 takeover?

3 A It does. This is the same analyst report, August 10th,
4 2010, and it says, quote: And King's focused pain management
5 commercial infrastructure and pipeline makes it a potential
6 takeout target for several large and mid-cap pharma companies.

7 Q So, if we could, let's move to slide 11. This is an
8 analyst report that we've actually seen in evidence during the
9 Government's case.

10 Do you recall that?

11 A I do.

12 Q And do you recall it coming up during the testimony of
13 Mr. Shechtman?

14 A Yes.

15 Q That this article was e-mailed to him by Mr. Klein?

16 A That was my understanding, yes.

17 MR. MEAD: Your Honor, I apologize, but we don't
18 have this separately marked as a defense exhibit. At trial,
19 we will mark it as Defense Exhibit 23A.

20 THE COURT: Okay.

21 MR. MEAD: But you've seen it before.

22 THE COURT: All right.

23 Q So, has this slide -- first, what's CLSA?

24 A Credit -- Credit Lyonnais Securities of Asia and Credit
25 Lyonnais is a French company that was acquired by Credit

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1 Agricole. Credit Agricole was, at least at that time, I think
2 it still is, is the largest French industrial commercial bank
3 that's all there in France and they have offices here in New
4 York. I think it's on Sixth Avenue, Avenue of the Americas.

5 Q Is there a building actually with their name on it?

6 A There is, yes. They're huge.

7 Q Okay. So, in terms of what you selected from this
8 article that was important -- that was important to your
9 opinion about what a financial advisor looking at
10 publicly-available information as of August 16, 2010 would
11 have focused on or potentially focused on?

12 A Yes. What it says is it's trading at 8.58 a share. This
13 is August 16th, 2010, the date that's of issue here in this
14 case. And it says: "Our TP - our target price, that's what
15 they're projecting - "of U.S. dollars \$11 a share implies
16 upside of 28 percent and so we believe that the risk/reward is
17 favorable."

18 So, what they're saying is that their target price
19 is 11, it's going from 8.58 a share up to 11, that implies a
20 28 percent increase, and that the risk/reward, any time you
21 invest, there's always risk in investing, even in U.S.
22 treasury bills. Hopefully the U.S. Treasury will never
23 default, but there is implied risk in that. And as you walk
24 the investment chain to different types of investments, the
25 rewards you get for taking on more risk has to be commensurate

1 with the additional risk that you take. So that's what that
2 means here.

3 They're talking about that yes, there's some
4 volatility, and if you read through the actual analyst report,
5 there's some positives and some negatives baked into it, but
6 at the end of the day, the conclusion is that risk/reward is
7 favorable. In other words, they would take the position it's
8 a buy position, and that's what it says at the top, they are
9 recommending buy, that they buy, that reward outweighs the
10 risk that you would take in the stock.

11 Q Do you recall whether there's a specific mention of a
12 potential acquisition in this article?

13 A I don't recall seeing that. I'd have to go back and
14 look. I don't think there was.

15 Q So, we've seen two positive articles from the summer of
16 2010 that mention the possibility of the takeover and two that
17 are positive but don't mention the possibility of the
18 takeover?

19 A That is correct.

20 Q In your expert opinion, based on your experience as a
21 financial advisor, your experience with that industry, if you
22 were researching the stock yourself or if a investment advisor
23 who's researching the stock, would the mention of potential
24 takeover lead you to do another kind of research?

25 A Absolutely. Let me explain, Your Honor.

1 When companies are taken over, there's something
2 called a control premium or a premium on price, and that's
3 because even looking the context of this, we know Pfizer
4 acquired King at a premium. It's much cheaper for a company
5 to pay that premium using their stock as legal tender than
6 going out and building more infrastructure, investing in R&D,
7 developing a pipeline of drugs. So they are willing to pay
8 what's called a premium above the trading price to get control
9 of the whole entity. And that's well-documented in investment
10 theory all the way back.

11 Control premiums at that time in the pharma industry
12 were anywhere from 35 to -- I mean, there were outliers at 95
13 percent, but they hovered around 40 to 50 percent. That's
14 what the research shows.

15 When you see mention of a potential takeout, a
16 potential merger, that triggers okay, this stock may actually
17 bump higher than what they're saying. We saw some that talked
18 about an \$11 target price, 28 percent. If I told you a minute
19 ago that control premiums were averaging 40 to 50 percent,
20 that 28 is short of the 40 to 50. So there's upside room
21 there.

22 So, that would cause me as an investment advisor,
23 and it should cause others if they were out there, to question
24 what's going on and do additional research. I wouldn't stop
25 here.

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1 Q Did you personally do additional research?

2 A I did.

3 Q What did you do?

4 A I went to Google and started Googling the Internet and
5 saw what I could find, and in addition to Google, there were
6 some documents produced by the Government in this case that --
7 matter of fact, all of the documents that the Government
8 produced I had access to, and I had access to documents that
9 you produced as well. But in addition to that, I went to
10 Google.

11 Q So, if we could look at slide 12, does slide 12 contain
12 kind of highlights from four different articles you found?

13 A It does. There's four articles. I just put them up
14 there for ease. One is Bloomberg in the upper left. Moving
15 to the upper right --

16 Q Slow down if you could and give us the date of each one
17 of those.

18 A Sure. The Bloomberg is August 5th, 2008.

19 Moving to the right --

20 MR. MEAD: Your Honor, that we will mark as Defense
21 Exhibit 23B.

22 THE COURT: Okay.

23 A Moving to the right, it the CBS News article from
24 MoneyWatch, and that is dated August 6th, 2008.

25 MR. MEAD: And Your Honor, that will be marked

1 Defense Exhibit 13.

2 A There was an article from Street Insider, moving to the
3 bottom left, dated April 15th, 2009.

4 MR. MEAD: Your Honor, that's Defense Exhibit 46.

5 A And moving to the bottom right, from Thompson Reuters,
6 there's an article Friday, November 30th, 2007.

7 MR. MEAD: And that, Your Honor, is Defense
8 Exhibit 42.

9 Q What do all four of these articles in the period from
10 2007, 2008, and 2009 share in common?

11 A They all mention potential takeover for King
12 Pharmaceuticals.

13 And let me just see for a minute. One, two, three
14 of them actually mention Pfizer in them. I don't think the
15 Street Insider actually mentions Pfizer, but the Bloomberg
16 article --

17 Q From what year?

18 A This is in 2008.

19 Q Mentions Pfizer, right?

20 A Yeah. It says: "King Pharmaceuticals Inc.'s call option
21 trading was the busiest since 2004 and its shares rose to an
22 11-month high on speculation Pfizer Inc., the biggest U.S.
23 drug maker by market value, will buy the company." And then
24 there's some other things.

25 Moving to the right, to the MoneyWatch article from

1 CBS News, it says in red: "King's shares rose to an 11-month
2 high on rumors that Pfizer may be interested in acquiring it."
3 And then it talks about that: "Pfizer's CEO, Jeff Kindler,
4 made a lot of noise a few years ago about making acquisitions
5 to beef up Pfizer's dwindling pipeline."

6 As I explained to you earlier, the pipeline of these
7 companies is the lifeblood of the pharma company.

8 Moving to the Street Insider, bottom left, title:
9 "King Pharmaceutical sees upside on takeover rumor." And it
10 talks about: "Shares of King Pharmaceuticals are moving
11 higher today on unsubstantiated takeover speculation."

12 Q What's the date there?

13 A August 15th, 2009.

14 Q How about the one on the bottom right, what year is that?

15 A November 30th, 2007. Title: "King Pharma options up on
16 takeover talk." And hard for me to read the whole thing, but
17 it says, part of it: "Fueled by speculation that drug maker
18 may be acquired according to several option analysts. There
19 are rumors that Pfizer might be very interested in acquiring
20 King Pharmaceuticals."

21 Q Did you find another article specifically mentioning
22 Pfizer as you did further research last night?

23 A I did. I've been sitting, as Your Honor pointed out,
24 through the trial from the very beginning, and as an expert I
25 continue to listen to everything. And I went home and did

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1 some research back on the Internet and found yet another
2 article that is not in here but I gave to you this morning.

3 Q Do you recall which -- what press it was? Who wrote it?

4 A I think it's the futures -- I don't recall the name. I
5 think something about futures in it.

6 MR. MEAD: May I approach, Your Honor? I think we
7 gave it to you in your package, Defense Exhibit 53.

8 Q Is that the article you found on the Internet last night.

9 A It is. This is from Future Magazine, so it's a trade
10 publication, and this was dated August 5ths 2008. And it
11 says: "King Pharma moves on takeover talk."

12 Q So there are articles from 2007 and 2008 it looks like
13 specifically mentioning Pfizer?

14 A That is correct.

15 Q And then another one from 2009 not mentioning Pfizer but
16 talking about takeover rumors?

17 A That is correct.

18 Q And how would this be relevant to a financial advisor
19 evaluating publicly-available information about King stock as
20 of August 16, 2010?

21 A These are all important pieces of information in the
22 overall mix of information. And given this information as an
23 investment advisor, you could go then look at Pfizer. You
24 could start to do analysis on Pfizer.

25 Talks about in one of these articles Pfizer's CEO

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1 was rumored to have said he wanted to fill the pipeline. They
2 were looking to do acquisitions to fill that pipeline. You
3 could certainly look at Pfizer, look at the information about
4 Pfizer that's out there. Look at option trading on Pfizer.
5 Look at option trading on King. In other words, this is sort
6 of a gateway to conducting the rest of the due diligence if
7 you were an investment advisor about to put your clients into
8 King stock or to buy options.

9 Q So, as a sideline.

10 MR. MEAD: I wouldn't do in front of the jury, Your
11 Honor.

12 Q They mention Jeff Kindler being the CEO of Pfizer?

13 A Yes.

14 MR. MEAD: He was on my floor at Williams and
15 Connolly in 1998. You want to talk about lives going in
16 different directions. I'd hate to think about his net worth
17 right now.

18 THE COURT: He was an associate at Williams and
19 Connolly?

20 MR. MEAD: Yes. Smart man, a really smart man.

21 Q So, to be fair, you have looked for favorable articles
22 from this time frame, right?

23 A That's correct. I was asked to do that, correct.

24 Q And is there a way to kind of -- in your experience, is
25 there a way to kind of summarize the overall picture of what

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1 analysts were doing in that time frame related to King?

2 A Sure. I mean, generally in the analyst world, there's
3 something called consensus ratings where ratings agencies or
4 services or reporting services will go out and poll analysts
5 that are covering a stock and they will poll them as to
6 whether they think they should buy it, hold it or sell it, and
7 then they will publish that information out to the market, and
8 then they usually will go through an analysis of that to
9 determine on a percentage basis how many are saying buy, how
10 many are saying hold, how many are saying to sell, to give
11 readers a sense of, you know, where are people on this
12 particular stock.

13 Q So, did you look for that kind of consensus evaluation?

14 A I did.

15 Q Can we turn to slide 13, please?

16 What is this, Mr. Dubinsky?

17 MR. MEAD: Your Honor, this single sheet is marked
18 as Defense Exhibit 30, and unfortunately it has Mr. Dubinsky's
19 highlighting on it in the exhibit because we didn't have a
20 clean copy. Expert messed up.

21 THE WITNESS: I did. I apologize.

22 A This is information pulled from Bloomberg, the Bloomberg
23 terminal. So I pulled this -- at Duff & Phelps we have access
24 at, because of the investment banking work we do, we have a
25 subscription to Bloomberg. And this is as of July 31, 2010,

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1 so a couple of weeks before August 16th, 2010.

2 Q Did you see the same report as of August 31, 2010?

3 A I did.

4 Q And were the numbers roughly the same?

5 A They were.

6 Q Why did you pick July 31 as opposed to August 31?

7 A Well, it's easy to play armchair quarterback after
8 something happens, an event, and the event in this case was
9 August 16th, that's when the King shares were being purchased.
10 So I didn't think it would be fair to look post facto. I said
11 let's look at the month immediately prior to when this action
12 took place.

13 Q Okay. Now, this report by Bloomberg, the summary, only
14 talks about 15 analysts covering the stock.

15 A Correct. And you can see that, Your Honor, where it says
16 buys, holds and sells. Next to the percentages there are
17 numbers. So that 8, the 5 and the 2 added up is 15. So they
18 went out and did a consensus rating from 15 analysts and they
19 do a weighted average of that and they said 53.3 percent of
20 the analysts, 8 divided by 15 in other words, said buy, 33 .3
21 said hold, and 13.3 percent said sell. So two analysts are
22 saying hey, time to sell the stock, five are saying hold it,
23 don't do anything, and 8 are saying buy.

24 Q Now, in your experience, Mr. Dubinsky, you would expect
25 more than 15 different companies that purport to be following

1 companies to have been following King at this time. Would
2 that be accurate?

3 A You will find that -- I didn't look specifically to King.
4 You will find in the industry, depending on the stock,
5 sometimes there could be 50 or 60 people that claim to be
6 following it. But what you will find is usually there is a
7 core group of analysts that make it their business to follow
8 that particular stock. They may be sector specialists in the
9 health care or pharma and they know that industry, they know
10 the players. This is what they're doing.

11 So, Bloomberg when it does its consensus rating will
12 go out and try to find the more reputable or the ones that are
13 really having the deep analytics because Bloomberg is putting
14 this out on their information, they're selling the service.
15 So that's why there's 15 here from that standpoint.

16 Q All right. So, I think we showed four articles, analyst
17 reports from the summer of 2010, and there are 8 saying buy,
18 right? Do you see that?

19 A Correct.

20 Q So from that number, will you conclude that there are
21 probably four other favorable articles that if we could find
22 would say something favorable that you could put up on a
23 slide?

24 A I'm sure you could find four favorable, four that are
25 holds, maybe one --

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1 Q Well, then let's get to that.

2 So at a minimum we know there are going to be five
3 holds, right?

4 A Correct.

5 Q So those reports probably aren't going to be as favorable
6 as the four that we've shown, right?

7 A I would agree with you.

8 Q And then there are two that say sell, right?

9 A Correct.

10 Q And those two obviously are going to be negative?

11 A They would be bearish on the stock. In other words,
12 telling their people hey, sell the stock.

13 Q Did you find those two negative ones?

14 A Did I find them?

15 Q Yes.

16 A I don't recall.

17 Q So you're not suggesting in any way that the four
18 articles that we've talked about that contain favorable
19 information is all of the information that was available?

20 A No, not at all.

21 Q Okay. But again, understanding that it is a selection,
22 why is it relevant to your opinion?

23 A Well, again, when you're trying to analyze a stock and
24 you go into the market and you see the information that's out
25 there, especially if you're focusing on a particular stock and

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1 you're seeing enough information about a potential takeover,
2 about upside potential, even, Mr. Mead, this particular one up
3 on the screen talks about a 20.4 percent return potential. So
4 if you look at what Bloomberg is saying, the last price 8.76
5 12-month targeted price of 11 and a quarter, they're putting
6 out too there's huge return potential.

7 So, if you're looking to invest in a stock and you
8 see this information, it becomes very important then in the
9 overall analytics, due diligence, and thought process to
10 consider this.

11 Q But there are going to be other stocks out there that are
12 also going to have favorable analyst reports, right?

13 A Absolutely.

14 Q And an investment advisor has to pick and choose between
15 which stocks you want to invest in and which analyst reports
16 you find are more reliable?

17 A Absolutely.

18 Q Okay. How do those specific articles from 2007 and 2008
19 that specifically mention Pfizer as a potential buyer of King
20 and the 2009 article that talks about rumors of the takeover
21 without mentioning Pfizer, how do they play into your opinion?

22 A Well, again, the analyst reports that we saw in the 2010
23 time period talk about potential acquisition. One said
24 "screams acquisition target." It supports that what these
25 analysts are reporting on and what they believe might happen

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1 is supported by prior rumors in the marketplace, prior
2 information in the marketplace, and so that becomes part of
3 the overall information that you have as an investment advisor
4 to look at to determine do I want to buy this stock for a
5 client, do I want to recommend this stock for a client, do I
6 want to stay away from it. Those are all things that would be
7 considered in the process of doing that due diligence.

8 Q Can we turn to slide 14, please?

9 What is slide 14, Mr. Dubinsky?

10 A This was -- I went and put just the four main product
11 lines or the biggest product lines of King's business. So the
12 EpiPen, I know there's been a lot of talk in the news, but
13 they had the EpiPen. Remoxy was their painkiller drug, the
14 Animal Health line. So these are different lines of business
15 within King, and the point here is it supports the analyst
16 reports that we read where they were talking about the sum of
17 the parts and whether somebody would come in and buy just the
18 EpiPen, there might be a patent left on that of ten years, and
19 I don't know specifically, but drugs would have a patent, and
20 that has value to people. So they could come in and buy that.
21 They could buy the Remoxy if it's been FDA approval. Again,
22 when companies look to buy companies, sometimes they want the
23 whole thing, sometimes they want a segment, sometimes they
24 want within a segment of the division, sometimes they want a
25 product line. It's just different -- and no one would know

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1 until either it's announced or you're involved in the deal
2 part of, you know, your deal counsel or your accountants, like
3 if I was doing due diligence on it as part of the deal team,
4 you might know what they're looking at at that point.

5 Q Can we turn to slide 15, please?

6 So, does slide 15 summarize your opinion about your
7 research in publicly-available information on King stock as of
8 August 16, 2010?

9 A It does.

10 Q And what is that opinion?

11 A My research showed that it was publicly-available
12 information about King stock as of August 16th, 2010, that
13 contained positive information about King that an investment
14 advisor and reasonable investor would consider in evaluating
15 whether or not to make an investment in King stock.

16 Q Is an investment advisor part of the category of
17 investors?

18 A Yes, as an investment advisor, I invest. I mean, I had
19 money in the market, absolutely.

20 Q Do you now as you speak?

21 A I do, yes.

22 Q So do you do anything different in terms of evaluating
23 your own personal selections of stock than you did as an
24 investment advisor?

25 A I would say I'm probably a little more critical now

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1 because I'm involved in a lot more litigation, so I see things
2 that go on in companies. So I just come at it with a little
3 more critical eye, but in general, no, I approach it the same
4 way.

5 MR. MEAD: Your Honor, I take it you do not want me
6 to go into the slides related to the other opinion? I think
7 we've made our record with respect to --

8 THE COURT: Yes, I do not want you to.

9 MR. MEAD: Just to preserve the record, we've shown
10 you the Power Point. You've heard our basis. You understand
11 what we would seek to introduce.

12 THE COURT: I do.

13 MR. MEAD: Okay. Thank you, Your Honor.

14 MS. NESTOR: Mr. Mead, can I ask you a question?

15 MR. MEAD: Sure.

16 MS. NESTOR: Do you plan on admitting this into
17 evidence?

18 MR. MEAD: No, but I wanted to mark it for
19 identification so we could talk about it.

20 THE COURT: Ms. Nestor, what's this that you're
21 referencing?

22 MS. NESTOR: The Power Point. I just wanted to make
23 sure he wasn't trying to admit it.

24 THE COURT: Okay. Did you want to examine?

25 MR. PITLUCK: Very briefly, Your Honor. Can I just

1 do it from here?

2 THE COURT: Yes.

3 CROSS-EXAMINATION

4 BY MR. PITLUCK:

5 Q Mr. Dubinsky, you mentioned a FINRA proceeding in which
6 you testified as an expert witness recently, correct?

7 A Yes.

8 Q That was related to Facebook stock?

9 A Yes.

10 Q And were you opining on what that original -- what that
11 specific investment advisor was doing?

12 A Yes.

13 Q And as part of that, did you review any information for
14 Facebook stock that was publicly available?

15 A I did not.

16 Q And you didn't make any independent assessment as to
17 whether it was proper to buy or sell Facebook stock at that
18 time?

19 A That is correct.

20 Q Have you ever testified as an expert on that specific
21 topic matter, on the propriety of an investment advisor in
22 evaluating investment decisions?

23 A I would have to go back to the list of testimony. I know
24 there was a proceeding in arbitration involving a pension
25 plan, and I believe that was the subject of it. I'd have to

1 go back and look. That was the --

2 Q When was that?

3 A I don't know. I'd have to look at the -- it was the, I
4 think, Borax case. If you had a list of cases I could --

5 Q I do because I was able to find it online. It wasn't
6 provided to me by Mr. Mead.

7 But you filed something in the Madoff proceeding,
8 correct?

9 A In the criminal case in the Southern District.

10 Q In the criminal case with a list of your expert
11 testimony?

12 A That is correct.

13 Q Do you remember approximately what year this Borax case
14 was?

15 A I don't.

16 MR. PITLUCK: Your Honor, if I may, I'm just showing
17 him it was publicly filed on ECF (handing).

18 A It's on page 5 of 6. It was a what used to be called the
19 NASD arbitration. That was the predecessor to FINRA. So
20 again was a proceeding in that, and it was the Phil Adams
21 Company Profit Sharing Plan versus Trautman Wasserman, and I
22 believe, and this is back in 2002, I believe there were issues
23 in that case dealing with propriety of the investments that
24 were being made for the profit sharing plan by Trautman and
25 Wasserman.

1 And let me just take a minute and look through, if I
2 can, the other cases.

3 Q Sure, of course.

4 A (Perusing document.)

5 There's a case on page 2 of 6, Sands Capital
6 Management versus Scott O'Gorman. This was an American
7 Arbitration Association hearing in 2010. That dealt with
8 investment advisors and it dealt with compensation related to
9 the breakup of that firm and what the investment advisor had
10 done, so I don't think it directly beared [sic] on your
11 question.

12 Let's just see.

13 (Perusing document.)

14 There's a host of cases against KPMG. These arose
15 out of, and you'll see them spread out in the list, arose out
16 of their share of fraudulent tax shelters declines. So I
17 testified against KPMG in a number of depositions and some
18 trials regarding the propriety of them. They were also
19 registered as a -- they had an investment advisory arm for
20 KPMG that was not a proper investment. These were fraudulent
21 tax shelters and that was part of the testimony in those --
22 there's about 8 or 10 of those cases. Actually, there's
23 probably more of those than 10.

24 (Perusing document.)

25 I think those are it.

1 Q So, is it safe to say you've never actually been
2 qualified as an expert on the scope of testimony that you're
3 purporting to give today?

4 A No, I don't think so. In the Madoff case, Judge Swain
5 qualified me in what she called SEC investment matters, and I
6 talked a lot about the types of investments Mr. Madoff
7 purportedly was selling the clients, the split strike
8 analysis, a convertible arbitrage. I was proffered on a
9 variety of topics, qualified in front of Judge Swain on all of
10 those topics, and testified for four days for the U.S.
11 Government in that capacity.

12 Q Did you testify to the underlying investments that Mr.
13 Madoff made and whether or not they were appropriate?

14 A Well, the fact was he never made any investments, but I
15 was analyzing the investments that he purportedly made for
16 people, the information surrounding those, the lack of trading
17 tickets, confirmations, account statements, computer -- I
18 mean, on and on and on. I was on the stand for four days.

19 Q As a fraud examiner, right?

20 A Well, I was qualified as -- Judge Swain qualified me in
21 investment -- SEC investment matters as it related to Bernie
22 Madoff's registered investment advisor practice. He had
23 registered, that's what it was, and that's what I was
24 qualified for.

25 Q Now, you testified, I want to ask you specific questions,

1 I think I may have missed it. There was a Collins Stewart
2 report, which is Defendant Exhibit 14, and I think I may have
3 just missed this, so this is more for my clarification.

4 You testified as to the DCF.

5 A Yes.

6 Q Discounted cash flow analysis. I want to make sure I
7 understand it.

8 Was your testimony that the DCF indicates from
9 Collins Stewart that King was a likely acquisition target?

10 A No, I didn't say that.

11 Q Okay. I thought I may have been writing and I wanted to
12 make sure I didn't miss it.

13 A Sure.

14 Q And you testified a little bit from when Mr. Mead was
15 questioning you that you've had some experience in the
16 pharmaceutical arena, correct?

17 A Correct, pharmaceuticals and health care, yes.

18 Q And I think you said Novartis?

19 A No, Actavis.

20 Q Actavis, I'm sorry.

21 What kind of experience did you have testifying as
22 expert for those companies, or performing expert analysis for
23 those companies?

24 A So, it was involved with a drug compound, as best I could
25 recall, and patent issues and I was dealing with the damages

1 relating to potential patent infringement, so when somebody
2 fringes on a patent, there's statutory damages and I'm called
3 in a lot to calculate those damages.

4 Q You've never worked for King before, correct?

5 A No, I have not.

6 Q And so your preparation for this case was focused on King
7 primarily, correct, King Pharmaceuticals?

8 A For this opinion, yes.

9 Q Yes.

10 A Yes.

11 Q And approximately how long did you spend preparing for
12 that?

13 A I was hired, I believe, in January of this year. So I've
14 been working on it since January.

15 Q And in that time, that's when you've been reviewing the
16 research reports and the news articles and things like that,
17 correct?

18 A Yes.

19 Q Fairly time-consuming process?

20 A Yes. I have other cases going on and a heavy workload,
21 but yes.

22 Q And you would agree with me, wouldn't you, Mr. Dubinsky,
23 that the financial markets are fairly fluid?

24 A Depends. I mean, in 2008, they weren't. If you're
25 talking about today in most sectors, I would agree with you,

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1 but there have been times when it's been very illiquid and
2 locked up. So I wouldn't say it's fluid.

3 Q And how would you describe the period between 2007 and
4 2010?

5 A In some sectors very distressed and if you looked at the
6 mortgage sector, we all know the subprime sector, I did a lot
7 of work on cases on that, very distressed. The fact that
8 there was totally illiquidity in the market caused a lot of
9 problems. The market started coming back after that, but, you
10 know, markets go up, markets go down. We're at a good time
11 right now with the markets going up, but things change.

12 MR. PITLUCK: Judge, I have nothing further.

13 THE COURT: Anything else?

14 MR. MEAD: Nothing further, Your Honor.

15 THE COURT: Do you want to be heard?

16 MR. PITLUCK: I'm sorry?

17 THE COURT: Do you want to say anything else?

18 MR. PITLUCK: Judge, I'd like to be able to argue,
19 at least related to --

20 THE COURT: You can step down. Thank you.

21 THE WITNESS: Thank you, Your Honor.

22 (The witness leaves the witness stand.)

23 MR. PITLUCK: -- to the scope of some of this and to
24 make sure that we cabin the appropriate issues because there
25 was --

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1 THE COURT: I think I'm cabining it.

2 MR. PITLUCK: Okay. Well, there was analysis of the
3 sale of product lines and going through the research reports
4 to say, you know, this specific acquisition divestiture of
5 this specific provision can unlock value in a corporation.
6 That's very different --

7 THE COURT: Let me just give you my ruling.

8 MR. PITLUCK: I'm sorry.

9 THE COURT: Because I think I cabin it appropriately
10 for the issues that are relevant in this case to this jury,
11 and then if you want to say, "Well, I think that's wrong, we
12 should be able to say this," I'll hear you on it.

13 I find that Mr. Dubinsky's proposed testimony is
14 admissible insofar as it concerns, A, the kinds of research
15 that a reasonable financial advisor would do prior to
16 recommending particular stocks; and B, the type of
17 information about King Pharmaceuticals that would have been
18 available to a financial advisor engaging in that sort of
19 research on August 16th, 2010.

20 As an initial matter, Mr. Dubinsky is clearly
21 qualified to testify as to this information. He's represented
22 that he's worked as an investment advisor and financial
23 planner for high net worth clients for over a decade and
24 currently holds numerous relevant certifications. He has
25 previously been admitted as an expert witness in federal court

1 on similar issues. I find his experience and expertise
2 impressive and that he's qualified to testify as an expert on
3 this issue.

4 I'm admitting his proffered testimony because I find
5 that it will be helpful for the jury for three reasons.
6 Frankly, I'd be inclined to allow Mr. Dubinsky to testify
7 based on any one of these reasons standing alone. The fact
8 that his testimony is helpful on all three grounds only
9 strengthens my finding.

10 First, Mr. Dubinsky's proffered testimony will be
11 helpful in evaluating the materiality of the information
12 allegedly disclosed by Mr. Schulman. As Mr. Schulman's
13 counsel has rightly noted, materiality is examined under an
14 objective standard that turns on whether there is a
15 substantial likelihood that the alleged inside information
16 would have been viewed by the reasonable investor as having
17 significantly altered the total mix of information made
18 available to investors at the time. The type of information
19 that was available to a reasonable investor on August 16th,
20 2010 is clearly relevant to this determination and is not the
21 type of lay issue that a jury is able to determine based on
22 their own experience.

23 Second, Mr. Dubinsky's testimony will be helpful to
24 supplement the articles already entered into evidence by the
25 Government in their case-in-chief. Without Mr. Dubinsky's

1 testimony, the jury will be left with the potentially
2 misleading impression that those articles comprise the
3 entirety of the information available to a reasonable investor
4 at the time.

5 Third, and related to the second point, Mr.
6 Dubinsky's testimony will be helpful in potentially
7 reconciling the conflict between Mr. Schulman's testimony that
8 he never mentioned Pfizer to Klein, and Shechtman's testimony
9 that Klein told him that he had inside information that Pfizer
10 was acquiring King. The Government has suggested that it will
11 argue that the jury should resolve this conflict by concluding
12 that Mr. Schulman is lying. Mr. Dubinsky's testimony may be
13 helpful to the jury in evaluating Mr. Schulman's likely
14 counterargument that Klein himself determined that Pfizer was
15 involved after hearing Schulman's statement.

16 On the other hand, Mr. Dubinsky's proffered
17 testimony that high net worth individuals often do not review
18 the details of their brokerage statements is not admissible.
19 I find this to be a lay issue with which the jury needs no
20 expert help. The members of the jury are no doubt aware that
21 many people do not carefully review their mail, even if
22 they're not high net worth investors themselves.

23 Through the testimony of Ronnie Schulman, Mr.
24 Schulman's counsel has laid the groundwork to allow them to
25 argue that the Schulmans did not carefully review their trade

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1 confirmations and monthly and quarterly statements. Mr.
2 Dubinsky's testimony would add little or nothing to Mr.
3 Schulman's case and would present a substantial risk of either
4 confusing the jury or prejudicing the Government. For that
5 reason, it's inadmissible.

6 All right. Do you need any clarification?

7 MR. PITLUCK: Well, Judge, I guess I do because the
8 devil's sort of in the details.

9 I understand the Court's ruling. We obviously are
10 in total agreement, but the issue here was there were some
11 points of proffered testimony that I think went outside of
12 that in terms of interpreting the information.

13 THE COURT: No, I foresee him testifying about "This
14 is the universe of information that was out there. This is
15 how some -- a financial advisor would look. These are the
16 kinds of places he or she would look and these are the kinds
17 of things that came up when I looked." Not "And therefore it
18 would be a prudent investment decision to buy options in
19 King."

20 The second leg is not happening, but the first leg
21 is happening.

22 MR. PITLUCK: And I understand and --

23 THE COURT: If they choose to use him.

24 MR. PITLUCK: But my concern was there were things
25 like: "And did you see any testimony, did you hear any

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1 testimony that was relevant to that issue?" And he said:
2 "Why, yes, that Mr. Schulman said he didn't know if it was a
3 partial merger or a full merger."

4 And that's, I think, outside of the scope of the
5 Court's ruling.

6 THE COURT: I don't foresee that being part of his
7 testimony.

8 MR. PITLUCK: I mean, it just was, Judge.

9 THE COURT: But it's not going to be before the
10 jury.

11 MR. PITLUCK: Thank you. I just want to make sure I
12 understood it.

13 THE COURT: Okay?

14 MR. MEAD: Well, I'm obviously grateful for
15 everything except opinion number 2 and what you just said.

16 So, I understand your ruling. I'm not here to
17 violate. But it was certainly my intention to preview for you
18 essentially what I will ask him in front of the jury.

19 THE COURT: Right.

20 MR. MEAD: So, I'm not going to step 2. You know, I
21 want to reassure you I'm not doing that.

22 THE COURT: Okay.

23 MR. MEAD: What you heard is what you're going to
24 get.

25 THE COURT: But I think you went a little further in

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1 some areas. I don't have it committed to memory, but I think
2 he's not going to be able to say: "And therefore, on August
3 16th, it was a prudent investment decision to buy King."

4 MR. MEAD: He never said that here, and I'm not
5 going to ask him.

6 But the one specific point, there are things in the
7 publicly-available information that talk about the possibility
8 of King stock realizing value from different product lines,
9 breaking it up.

10 THE COURT: He can recount what he saw in the
11 information, because otherwise it's just saying there was an
12 article in the FT. I expect he's going to recount what he saw
13 in the information. He's just not going to be able to draw
14 conclusions from it.

15 MR. MEAD: I'm not -- but I do want to flag for the
16 jury -- you know, one of the things that's personally
17 frustrating to me is we treat jurors like, you know, we can't
18 talk to them. You know, for example, the specific references
19 to product lines is consistent with Rob Schulman's testimony
20 before the SEC. You remember what he said, the Government
21 introduced it, that "I didn't know whether there would be a
22 merger involving the whole company or just particular product
23 lines."

24 The publicly-available information is corroborative
25 of that general understanding, and all I wanted to do, which I

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1 did in this drill here and what I would want to do in front of
2 the jury, is say is that relevant to -- and I asked him, you
3 remember I asked him: "Do you recall hearing Mr. Schulman's
4 testimony before the SEC that it could have been potentially a
5 whole merger or potentially a product line? Is this statement
6 of publicly-available information consistent with that?" He
7 said: "Yes." I want to flag that for the jury so they get
8 it, you know.

9 THE COURT: Well, he can talk about what is in the
10 public universe that a financial advisor would look at, you
11 know, what kinds of things he would research and what was in
12 that universe at that period of time.

13 MR. MEAD: Right.

14 THE COURT: But he can't draw conclusions from it.

15 MR. MEAD: It's not a conclusion. I'm trying to
16 flag for the jury hey, this is relevant to something Rob
17 Schulman said.

18 THE COURT: Tell me the question so maybe I need to
19 hear it that way.

20 MR. MEAD: Yes.

21 "Do you recall the introduction of Mr. Schulman's
22 testimony before the SEC?"

23 He sat through that.

24 "Yes."

25 "Do you recall that Mr. Schulman said to the SEC

1 that he was aware of negotiations and it could have meant that
2 the whole company's being acquired or it could have meant that
3 particular product lines might be acquired? How is this
4 statement in the public record, you know, that the company
5 could recognize value from particular product lines, relevant
6 to Mr. Schulman's statement?"

7 Right. And he's going to say: "It reflects what
8 analysts would have understood, which is the company could be
9 sold in pieces, could be sold entirely. You know, there's
10 publicly available information talking about the company being
11 sold."

12 All I'm trying to do is show the jury so that they
13 could actually understand when they're hearing it, Hey, this
14 is relevant to something Rob Schulman said.

15 THE COURT: Well, if one of the articles says that,
16 he can talk about the fact that the article says that.

17 MR. MEAD: Sure. All I'm trying to do is flag for
18 the jury when they hear it why that's important. I'm trying
19 to educate folks who are trying to keep track of information,
20 and there's nothing objectionable about that. I'm just
21 pointing out to them why it's relevant. They need to
22 understand what they're hearing.

23 THE COURT: Well, they're going to know why it's
24 relevant. It's relevant because you're going to argue that
25 there was enough information out in the marketplace that Klein

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1 could have decided to do this on his own or if he heard a
2 random remark, it wasn't your client passing on material
3 inside information that was material with the intent that it
4 be traded on. It was just a random remark and Klein put two
5 and two together and did research.

6 MR. MEAD: We're talking past each other. This is a
7 very specific separate issue.

8 THE COURT: I know, you want to connect the dots
9 between Mr. Schulman's testimony and --

10 MR. MEAD: Just about the part that it could mean
11 you're buying some of the company and not all of it. The
12 publicly-available information --

13 THE COURT: Let me stop you there.

14 Is your objection to the fact that he's going to
15 say: "Do you remember Mr. Schulman testifying to this and
16 isn't it right that they could buy a product line or a whole
17 company?"

18 Because you stood up.

19 MR. PITLUCK: My objection, Your Honor, is that
20 using an expert witness opinion testimony to bolster the
21 proffered testimony of Mr. Schulman.

22 THE COURT: Right. So your answer is "yes."

23 MR. PITLUCK: Yes.

24 THE COURT: So you don't -- I mean, he certainly can
25 testify that in the course of this research, it may suggest

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1 that a product line may be sold or the whole company, but you
2 object to exactly what my point is, which is taking Mr.
3 Schulman's testimony and saying: "So isn't that so?"

4 MR. PITLUCK: Yes.

5 THE COURT: Okay, fine. You can't do it.

6 MR. MEAD: Your Honor, I have interviewed jurors --

7 THE COURT: You can argue it at the end of the day.

8 MR. MEAD: I understand.

9 THE COURT: Which I'm sure you'll do very
10 effectively, but you're not going to do it with this witness.

11 MR. MEAD: Your Honor, I lost a criminal case when I
12 was an AUSA when I stood up in rebuttal --

13 THE COURT: You lost a criminal case when you were
14 an AUSA? Shocking.

15 MS. NESTOR: Shocking.

16 MR. MEAD: I thought so too. They were guilty and I
17 knew they were guilty.

18 THE COURT: All right. So what's this got to do
19 with us?

20 MR. MEAD: So, I stood up in rebuttal and I said to
21 the jury: "If anybody in that jury room says that they're
22 innocent, focus on this one transaction. It proves absolutely
23 that the defendant lied, they are guilty." I spent ten
24 minutes, it's the last thing I said to them. They were out a
25 week. They come back not guilty.

1 We're allowed to interview the jurors. I grabbed
2 one, I was like: "Did you talk about that last transaction?"
3 Obviously I'm joking around. I was polite. I was at a
4 reasonable distance, whatever. "Did you guys, what did you
5 think about that last transaction?" Never talked about it.

6 Judge, jurors need a flag from lawyers when they're
7 hearing testimony --

8 THE COURT: That's summation.

9 No, don't argue with me. I'm not going to permit
10 you to do it through this witness. I've given you a lot of
11 latitude. I think this is a generous ruling. You cannot do
12 that.

13 MR. MEAD: I understand your ruling. I'm trying to
14 explain why I feel it's appropriate. I'm just making a
15 record.

16 THE COURT: That's what summations for, to argue
17 what you think the testimony has shown and to connect the dots
18 for the jurors.

19 MR. MEAD: Jurors need --

20 THE COURT: They need a framework for analysis. I
21 know, but they're not going to get it during this expert
22 witness because I'm limiting what he's going to be able to
23 opine about.

24 MR. MEAD: I understand your ruling. We have a real
25 difference of philosophy on this point. I understand. I'm

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1 not going to violate your ruling. I get it.

2 THE COURT: I don't think it cuts the legs out from
3 under you on the argument.

4 Okay. Thank you.

5 Anything else?

6 MR. PITLUCK: Judge, one more thing to raise in the
7 interest of preventing sidebars.

8 THE COURT: We're going to be doing a charge
9 conference at 6 o'clock if this continues to go on.

10 MR. PITLUCK: I understand.

11 This is related to exhibits we received today from
12 defense counsel related to slides, interpretations,
13 demonstratives of evidence that the Government produced in our
14 summary chart, and when we talked to defense counsel this
15 morning, we still haven't had a chance to review the data in
16 these and compare them to ours, but they indicated that they
17 wanted to present them through Mr. Dubinsky.

18 THE COURT: Okay. Well, what are they?

19 MR. PITLUCK: I'll hand them up. They are financial
20 analysis of Tibor Klein's client's portfolio as comprised of
21 King and Mr. Schulman's portfolio comprised of King.

22 And our concern, Judge, is the mixing of fact and
23 lay witness, cloaking these in Mr. Dubinsky's authority as an
24 expert witness in the area of investment. And I believe that
25 the paralegal's going to testify on some summary exhibits.

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1 THE COURT: I don't see why these don't come in --
2 do you object to these coming in -- you don't object to these.
3 You object to Dubinsky opining on them.

4 MR. PITLUCK: Judge, assuming the information is
5 accurate in them, we haven't had a chance to review, we don't
6 object to them coming in.

7 THE COURT: Yeah, they can come in, but Dubinsky
8 can't talk about them. That's beyond my ruling.

9 MR. MEAD: Your Honor, I understand. I would make
10 it clear -- let me talk about two things here.

11 THE COURT: You really want to be here at 6 doing a
12 charging conference.

13 MR. MEAD: I'm sorry, but every piece of information
14 may save my client's life.

15 Mr. Dubinsky did the math for these charts. I will
16 make it really clear to the jury: "Mr. Dubinsky, I'm not
17 asking you as an expert about this. Not at all. All I'm
18 asking you to do is talk about some math you did. Did you
19 look at -- did you do the math adding up these percentages?"

20 THE COURT: But this doesn't require anybody to
21 explain it. Even I understand this.

22 MR. MEAD: If the Government stipulates to their
23 admissibility, all I need is him to say: "I did the math and
24 the charts are accurate." That's literally all I'm asking.

25 THE COURT: Well, I think if they're convinced that

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1 the math is right, we don't need Dubinsky, right?

2 MR. PITLUCK: I agree, Judge. Our objection is to
3 them going in through Mr. Dubinsky. I haven't heard the
4 questions, but the mere fact --

5 THE COURT: Do you have any reason to doubt the
6 math?

7 MR. PITLUCK: I have no reason to doubt the math,
8 Judge, but I have to do my job. Assuming they're right, we
9 have no problem with them coming in.

10 THE COURT: I think they come in. I just don't
11 think Dubinsky can talk about them.

12 MR. MEAD: So let's --

13 THE COURT: And they're self-explanatory, as I said,
14 even to someone who doesn't open her account statements. But
15 I'm not a high net worth individual.

16 MR. MEAD: Actually, you are. I guarantee you are.
17 But in any event.

18 THE COURT: What do you know about me?

19 MR. MEAD: Two daughters at Yale.

20 So, Judge --

21 THE COURT: 529.

22 MR. MEAD: -- if the Government objects to the math,
23 I can't get them in through any human being.

24 THE COURT: Will you check the math?

25 MR. PITLUCK: Judge, we'll check the math. We got

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1 them today. We were preparing for the hearing, I'm sorry.

2 THE COURT: I know. I think the math is probably
3 correct.

4 MR. MEAD: Judge, I wanted to alert you one more
5 thing.

6 You understand our objection to your denial of his
7 opinion about the opening the mail.

8 THE COURT: Yes.

9 MR. MEAD: I wish I had you on our jury for that
10 issue. You have a very strong personal opinion that it's
11 ridiculous to believe that the Government can prove beyond a
12 reasonable doubt that they knew about the trading just because
13 the envelopes were mailed. I want you on my jury. I really
14 do. But you're not on my jury.

15 THE COURT: Say that again. Wait, what?

16 MR. MEAD: You keep expressing a view that I share.
17 You keep saying as a matter of common sense, it is ridiculous
18 to believe that the Government could prove that the Schulmans
19 knew about the trading in King just by the fact that envelopes
20 were mailed to their house. Some people open, some people
21 don't.

22 THE COURT: I don't think that's their position.

23 MR. MEAD: I keep trying to tell you this, Judge.
24 Because you're not -- I keep pointedly asking them: Are you
25 going to argue that? And they keep ducking the question.

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1 You keep assuming the Government would never make
2 that ridiculous argument. They will. Ask them. And if
3 they're going to make that argument, you have to let me put
4 Dubinsky on the stand for that purpose.

5 Ask them. Preclude them from making the argument.

6 MR. PITLUCK: Judge, I'm a little confused. What's
7 the request to preclude us from entering?

8 THE COURT: I don't want to speak for Mr. Mead,
9 because you're far more articulate and persuasive than I am,
10 but I think he's wanting to know are you going to make the
11 argument that the Schulmans knew about the trades because of
12 their account statements.

13 Is that right?

14 MR. MEAD: Yes.

15 MR. PITLUCK: Judge, there is SEC testimony that was
16 admitted from Mr. Schulman where he admitted to opening his
17 statements and reviewing the first page of the document. How
18 are we not allowed to argue that?

19 MR. MEAD: First page of the documents is consistent
20 with Ms. Schulman's testimony. First page doesn't have King
21 on it. Has the pie charts and the summary. She testified:
22 "That's all we looked at."

23 The Government is announcing to you in code: "No,
24 no, no, we're going to call them liars just because the whole
25 statement was mailed to them." That's what the Government's

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1 going to argue.

2 I share your belief that that argument is absurd.
3 It should be barred under 403 absolutely. I want you on my
4 jury. But they are going to make the argument.

5 MS. NESTOR: Your Honor, we talked about this
6 earlier when I told you that we didn't have to disclose what
7 argument we're going to make because either way, whether we
8 argue to the jury, and I'm not saying we're going to, but
9 whether we argue to the jury that "Mr. Schulman did open his
10 statements, ladies and gentlemen," how is that expert
11 testimony? Why does expert testimony come in to tell them
12 that? They can make their own judgment based on what he said
13 to the SEC and based on, I'm sure, articulate arguments by
14 defense counsel that that didn't happen.

15 THE COURT: Well, also based on Ronnie Schulman's
16 testimony.

17 MS. NESTOR: Exactly, Your Honor.

18 MR. MEAD: If they call her a liar -- assistant
19 United States attorneys are going to stand up in front of this
20 jury and call her a liar on that point. If they do and we're
21 not allowed to put Dubinsky on the stand, we are sitting here
22 naked in front of an earnest government public servant telling
23 lay people that they know better than Dubinsky or my client.
24 It is outrageous.

25 Put them to the test. Ask them.

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1 THE COURT: Don't raise your voice.

2 Just remind me what day was the SEC, I want to
3 review the record on the SEC testimony.

4 MS. NESTOR: Would you like us to tell you the
5 government exhibit? Does that help you?

6 THE COURT: Yes.

7 MR. PITLUCK: 108A, Your Honor.

8 MS. NESTOR: She's giving it to you right now, Your
9 Honor.

10 THE COURT: I mean, I remember Ronnie Schulman
11 because it was just yesterday.

12 Page, line?

13 MR. PITLUCK: Sorry, Judge.

14 (Pause.)

15 THE COURT: So, you want to put Mr. Dubinsky on for
16 his opinion and based on his expertise that high net worth
17 individuals don't open their account statements or read them
18 carefully, right?

19 MR. SACK: Or read the details.

20 THE COURT: Just say "yes" or "no."

21 MR. MEAD: Yes. And I want to make an oral motion
22 under Rule 403 to preclude the Government from making the
23 argument that Ronnie Schulman lied or that Rob Schulman looked
24 at more than the first page because they have no evidentiary
25 basis for making that argument and it is unduly prejudicial to

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1 my client. I make that motion now.

2 THE COURT: Is somebody going to find me the page?

3 MR. PITLUCK: I'm sorry, Judge. I'm looking for it.

4 (Pause.)

5 MR. PITLUCK: I could be mistaken, Judge. I

6 apologize. I'm looking right now. And if it's not in

7 evidence, then obviously we're not going to argue it.

8 THE COURT: I looked quickly, but I'm tired of

9 looking at small print.

10 MS. NESTOR: We understand, Your Honor.

11 MR. PITLUCK: Judge, I don't see it in the Court's

12 ruling. So it's possible that it's not in. If it's not in,

13 then we're not going to argue.

14 MR. MEAD: Thank you.

15 THE COURT: Okay. Relax. Get some coffee.

16 We need to do a little more work on the charge. As

17 soon as we've got it in one piece, we'll bring it out to you.

18 Thank you.

19 Thank you, Mr. Dubinsky.

20 MR. DUBINSKY: Thank you, Your Honor.

21 (Recess taken.)

22 (Continued on following page.)

23

24

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1 (In open court.)

2 (Defendant not present.)

3 THE COURT: Okay. This is the charging
4 conference. So who wants to be heard first?

5 MR. PITLUCK: Judge, maybe it makes sense to go
6 through the Court's charge and just see if there are places
7 where we --

8 THE COURT: Okay. Do you want me to hear from you
9 first?

10 MR. PITLUCK: I think the only general charge that
11 we would ask for is included in ours -- on our request based
12 on the specific request basing the verdict on sympathy,
13 which is not --

14 THE COURT: I thought I had that at the end.

15 MR. SACK: I think you do.

16 THE COURT: I'm sure I do because it's in my
17 usual.

18 MR. PITLUCK: The only thing I saw, judge, was
19 improper considerations, but I apologize if it's there,
20 judge. I did not see it.

21 MS. NESTOR: I didn't either.

22 MR. PITLUCK: I looked at improper considerations,
23 to see if maybe it had been baked in there, and I didn't
24 find it.

25 THE COURT: What page?

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1 THE LAW CLERK: The reasonable doubt section.

2 THE COURT: What page?

3 THE LAW CLERK: Five.

4 MR. PITLUCK: The reasonable doubt. We would just
5 ask for sympathy not be baked into, to have a standalone
6 instruction rather than include it in reasonable doubt.

7 THE COURT: It is not sympathy.

8 THE LAW CLERK: It's also under role of the court
9 and the jury.

10 THE COURT: What page?

11 THE LAW CLERK: Page 4, first full paragraph.

12 THE COURT: Do you have a special -- do you have
13 it?

14 MS. NESTOR: Yes, Your Honor, we have it.

15 MR. PITLUCK: Judge, it's actually --

16 MR. SACK: Your Honor, on page 4, I think that
17 reference to sympathy is enough, and then in improper
18 consideration it is talks about any personal feelings you
19 may have. That's race, religion, et cetera, but I think
20 it's clear there is no decision based on sympathy and
21 personal feelings.

22 THE COURT: Yours is Q. What page is yours on,
23 your sympathy?

24 MS. NESTOR: It's request number 20.

25 THE COURT: It's page 44.

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1 MR. PITLUCK: Page 44, yeah. I'm just trying to
2 compare the two.

3 THE COURT: I think I cover sympathy.

4 MR. PITLUCK: I think you do, judge. I'm sorry.
5 I didn't see it in four. That was kind of -- it snuck in
6 there on me. We are good.

7 THE COURT: What's next?

8 MR. PITLUCK: Just, judge, in the first element --

9 THE COURT: Page, please.

10 MR. PITLUCK: I'm sorry. On your charge it is
11 page 21.

12 MR. SACK: So before we get there, I have one
13 comment on page 13, Your Honor.

14 THE COURT: Do you want me to just hear from you
15 back and forth as we go through the pages?

16 MR. PITLUCK: You can go through the pages.

17 THE COURT: Okay. Fine. Page 13?

18 MR. SACK: That's under co-conspirator statements.
19 So in the carryover from 12 to 13, the instruction says, if
20 you find the defendant was a member of the conspiracy,
21 et cetera. We think there should be a reciprocal statement.
22 Likewise, if you find that defendant was not a member of the
23 conspiracy, these acts may not be considered.

24 It's stated in a one-way fashion that it is
25 favorable to government. Given that the jury is called upon

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1 to make that finding of the existence of the conspiracy, it
2 should be reciprocal.

3 THE COURT: Are you suggesting that we put, after
4 the sentence that begins, this is so?

5 MR. SACK: Yes. Likewise, if you find that the
6 defendant was not a member of the conspiracy; and then the
7 language would be any act done or statements made by persons
8 you find not to have been members -- I have to figure out
9 what the exact phrasing is, but it's the concept.

10 THE COURT: So the likewise concept?

11 MR. SACK: The likewise concept.

12 THE COURT: Do you want to be heard on the
13 likewise concept?

14 MS. NESTOR: One moment, Your Honor.

15 THE COURT: Page 13, top.

16 MR. PITLUCK: Judge, we are fine. It's in our
17 charge on page 29. Obviously, if the court wants to propose
18 language.

19 THE COURT: You know, Mr. Sack, give me some
20 language. You don't have to do it right now. You can do it
21 over the weekend.

22 MR. SACK: Got it.

23 MS. NESTOR: It's on page 29 of ours.

24 MR. SACK: We will take a look at what the
25 government proposes, and we may agree on it.

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1 THE COURT: Okay. What's next?

2 MR. PITLUCK: Sorry, judge. We were looking at
3 page 21 under the first element, scheme or artifice to
4 defraud.

5 Judge, we have language that we took straight from
6 Sand. That's on page 10 of our charge that makes it clear,
7 as Sand does, that you need not find the defendant actually
8 participated in any securities transaction if the defendant
9 was engaged in fraudulent conduct that was, quote, in
10 connection with a purchase or sale; and that in connection
11 is satisfied, there was a nexus or relation between the
12 allegedly fraudulent conduct and the sale or purchase of
13 securities. I think that's particularly appropriate in this
14 case, and it's in Sand, section 5703.

15 THE COURT: So the paragraph -- you suggest adding
16 in your paragraph that says you need not, after the --

17 MR. PITLUCK: Yeah. Actually, judge, the next two
18 paragraphs of our charge on page 10.

19 MR. LEITNER: What part of Sand is it?

20 MR. PITLUCK: 5703.

21 MR. SACK: We are just taking another look at the
22 language.

23 MR. LEITNER: 5703?

24 MR. PITLUCK: I'm sorry, 57 --

25 MR. LEITNER: 23?

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1 MR. PITLUCK: 5721.

2 MR. MEAD: Where are you proposing?

3 MR. PITLUCK: After the first, in the first
4 element, scheme or artifice to defraud.

5 MR. SACK: SO there is a paragraph that begins the
6 first element, David?

7 MR. PITLUCK: Yes.

8 MR. SACK: Where would you put it in?

9 MR. PITLUCK: I would put it in after that.

10 MR. SACK: And then before the specific device
11 scheme.

12 MS. NESTOR: No.

13 MR. PITLUCK: Actually, we can put it after the
14 specific device scheme and before --

15 MS. NESTOR: An insider.

16 MR. PITLUCK: No, no, no. I'm sorry. Before the
17 specific device, scheme, or artifice paragraph. It's
18 separate and apart from insider trading.

19 MS. NESTOR: Correct.

20 THE COURT: Mr. Leitner, are you looking at that?

21 MR. SACK: Yeah, we are just taking a look now.

22 MR. PITLUCK: Judge, I'm happy to hand up a copy.
23 It's my only copy.

24 THE COURT: I have yours. It's on page 10, right?

25 MR. PITLUCK: Yes, judge.

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1 MR. MEAD: So as I understand the government's
2 concern, I think what they are saying is the defendant
3 doesn't personally have had to participate in the purchasing
4 of the securities to -- and that part you are entitled to.

5 The part in Sand in the standard instruction
6 starts to get really confusing for that. In other words,
7 there ought to be language that we can propose that gives
8 the government what it needs and is entitled to without all
9 this confusion.

10 THE COURT: Well, I'm reading. It's page 10.
11 It's the first two full paragraphs before insider trading,
12 right?

13 MR. PITLUCK: That's right, judge.

14 THE COURT: Are you objecting to it? Because I
15 don't think it's confusing.

16 MR. SACK: I think it's the last sentence that we
17 are most troubled by. Let me just huddle for a moment.

18 THE COURT: Okay.

19 MR. PITLUCK: Sorry. The last sentence of what
20 paragraph?

21 MR. SACK: It says, fraudulent conduct may be in
22 connection with, et cetera, touched upon a securities
23 transaction. I think we can live with the language before
24 that sentence.

25 THE COURT: Yes, I don't think that sentence adds

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1 anything.

2 MR. SACK: So it's going to add where it says the
3 allegedly fraudulent conduct in the sale or purchase of
4 securities, period. I think we can live with that.

5 MR. PITLUCK: Let me just read it without.

6 THE COURT: Yes, leaving out that last sentence?

7 MR. SACK: Correct.

8 THE COURT: I agree.

9 (Pause.)

10 THE COURT: Then you would agree to put the next
11 paragraph in?

12 MR. SACK: Let me just -- I thought that was the
13 paragraph.

14 THE COURT: It's the first two paragraphs of the
15 government's page 10.

16 MR. LEITNER: Which is the next paragraph, one
17 says is applicable.

18 MR. PITLUCK: Next paragraph on page 10 of ours,
19 it is no defense to an overall scheme.

20 MR. LEITNER: Okay.

21 MR. SACK: It seems to me I do have a problem
22 with -- it's just a very lengthy and complicated
23 instruction. I would think it would be suffice to say, to
24 address the government's stated concern, the sentence that
25 says it is not necessary for you to find that the defendant

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1 was the actual seller or offerer of the securities. I got
2 the sense that that was the concern, given the fact there is
3 an investment adviser here.

4 I don't think we would have a problem with adding
5 that sentence, but I think the overall -- the narration
6 about what is or is not a defense and all of that is
7 complicated and not clear.

8 MR. PITLUCK: Judge, we obviously don't think it's
9 complicated.

10 We think it's important because in this instance
11 it's particularly applicable, and Sand sets it out for that
12 reason. You don't have to actually engage in the securities
13 fraud. It doesn't mean you have less involvement because
14 you didn't do so.

15 We submit that it's clear. It's set forth in
16 Sand. I suppose, judge, it touched upon --

17 THE COURT: That sentence can come out.

18 MR. PITLUCK: To say Sand listed it, I think it's
19 just trying to explain in the jury instructions what that
20 is. If you want to take that out, we don't have any problem
21 with that; but we think the next paragraph is equally
22 important.

23 MR. SACK: What is this language about it is
24 sufficient if the government establishes the defendant
25 caused the statement to be made or the fact to be omitted?

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1 What does that have to do with this case?

2 MR. PITLUCK: Are you talking about the end of
3 that paragraph?

4 MR. SACK: Right. There is so much there in the
5 paragraph that seems unrelated to the facts of this case.

6 MR. PITLUCK: Judge, we are fine if you cut from
7 by, by the same token.

8 THE COURT: Omit from by?

9 MR. PITLUCK: Yes.

10 THE COURT: For the rest?

11 MR. PITLUCK: Excise from by --

12 THE COURT: I agree.

13 MR. PITLUCK: -- to the end.

14 THE COURT: I think that's your point, Mr. Sack.

15 MR. SACK: I think so. Obviously, I just want to
16 take a look at the final language, but I think that gets it.

17 THE COURT: I think I agree. Okay. Next page.
18 So did you have anything other than that?

19 MR. SACK: I think there is a general issue that
20 comes up, Mr. Leitner is going to address. I think we have
21 a concern about the repeated use of the anticipated language
22 rather than the intended language.

23 We think that anticipated is used several times on
24 pages 22 and 25, whereas we think the right language is
25 essentially say intended where it says anticipated.

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1 MS. NESTOR: Your Honor, you have a different --
2 the way this is written out is based on the 2016
3 instructions from United States versus Stewart; and I think
4 the point is there is a separate section that discusses
5 intent, and that's why the anticipated is there.

6 THE COURT: Do you object to it saying objected
7 rather than anticipated?

8 MS. NESTOR: I just don't think that's an element
9 of this particular --

10 MR. SACK: I think it is the element.

11 THE COURT: It is the element.

12 MR. SACK: It's intended to defraud, and
13 anticipated will tend to dilute the element.

14 THE COURT: We actually debated about intended or
15 anticipated, and I actually think intended is the
16 appropriate word. Okay. What's next?

17 MR. SACK: We have another item on 23. We
18 actually -- and we appreciate your inclusion of the third
19 full paragraph.

20 THE COURT: As an initial matter?

21 MR. SACK: As an initial matter, but we actually
22 would ask that you take it out because we don't think -- we
23 don't want to draw more attention to it in that way. We ask
24 that it be taken out. We appreciate it.

25 THE COURT: It's out. It's out. I assume as we

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1 move along to page 23, and then we move on, Mr. Pitluck,
2 you, Ms. Nestor, we are not going to go back.

3 MR. PITLUCK: That's certainly our hope. We are
4 talking about the anticipated versus intended right now, and
5 we will try to make sure that doesn't happen.

6 MR. SACK: There are some additional references on
7 25. Our view is the same throughout.

8 Then we will have -- but we don't want to rush the
9 government, but we will want to talk about the benefit
10 language on page 25 when everybody is ready.

11 MS. NESTOR: We would like to talk about the
12 merger language on page 24 first.

13 THE COURT: Okay. Tell me when you are ready go
14 to page 24.

15 MS. NESTOR: We are on page 24. Your Honor, we
16 would like to add certain language. We think the last
17 sentence of the first full paragraph on page 24 is currently
18 misleading.

19 THE COURT: The sentence that begins the fact?

20 MS. NESTOR: Yes, correct, Your Honor. I know
21 that the defense proposed that very language. It's been
22 proposed from -- and I can pass up a copy of the case to
23 Your Honor. It is unfortunately all marked up, but I'm
24 happy to pass it up. It's United States versus Mayhew.

25 It's a Second Circuit case, and I think the

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1 language is, frankly, diluted from what the case actually
2 says the law is. What this case says, moreover where
3 information regarding a merger originates from an insider,
4 the information, even if not detailed, takes on an added
5 charge just because it is inside information; and a major
6 factor in determining whether information was material is
7 the importance attached to it by those who knew it.

8 I mean that's very different from what the
9 sentence says now. It gives no direction to the jury as to
10 how they should weigh these factors. This specifically says
11 these factors are to be weighed.

12 THE COURT: Read it again to me.

13 MS. NESTOR: Do you want me to pass it up to you?

14 (Pause.)

15 MS. NESTOR: We want to say it specifically like
16 it says it in the case.

17 THE COURT: Starting with -- what's the sentence
18 begin with?

19 MR. SACK: The fact that --

20 MS. NESTOR: Your Honor --

21 THE COURT: If you too can agree on the language,
22 go ahead. Where is it in this? There is a lot of marking.

23 MS. NESTOR: I know, Your Honor. I'm sorry. This
24 is how I work, unfortunately. I circled it.

25 THE COURT: This would replace the fact?

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1 MS. NESTOR: It will replace that sentence.

2 MR. LEITNER: Are you proposing to take directly
3 the language from the Mayhew case?

4 THE COURT: You have it right there?

5 MR. LEITNER: I try to be prepared, Your Honor.

6 MR. SACK: He only does it when he is arguing,
7 Your Honor, not when partners are arguing, Your Honor.

8 THE COURT: Oh, moreover. So that's -- and so you
9 would end with information, or you would go on to and a
10 major factor in determining whether information was material
11 is the importance attached to it by those who knew it?
12 Okay.

13 MS. NESTOR: Exactly there.

14 THE COURT: Mr. Leitner.

15 MR. LEITNER: Hold on one second, Your Honor.

16 (Pause.)

17 MR. SACK: We have no objection.

18 THE COURT: I agree. I actually think it's
19 better. Okay. Next.

20 MS. NESTOR: Directed benefit, Your Honor.

21 THE COURT: Where are we?

22 MR. SACK: So page 25. It will be the last three
23 paragraphs on page 25, the last two. The next to last and
24 the one before that. In order to establish, and then the
25 personal benefit does not paragraphs.

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1 THE COURT: Okay. So who wants to be heard?

2 MR. LEITNER: I would like to be heard. So I
3 think we want intending instead of -- a similar change.

4 THE COURT: I'm going to do that.

5 MR. LEITNER: In addition to that, we think this
6 instruction leaves the jury at sea on the gift issue. So
7 not all disclosures of material nonpublic information
8 violate the securities laws. It has to be breach of a duty,
9 and one way of doing that, that means it has to lead to --
10 it has to be with an intent to do it to give a personal
11 benefit or to obtain a personal benefit. One way of doing
12 that is giving a gift.

13 But not all disclosures of material nonpublic
14 information are gifts. The jury needs to be instructed on
15 how to distinguish between gifts on the one hand and
16 non-gifts on the other. And in Salmon the Supreme Court
17 gave very specific guidance on explaining why something is a
18 gift. The reason that a transfer of material nonpublic
19 information is a gift is because it's the equivalent of the
20 tipper trading on the information and then giving the
21 proceeds to the tippee.

22 The gift is the equivalent of a cash gift. That's
23 lifted verbatim from the Supreme Court's explanation of why
24 a gift satisfies the personal benefit test. If that
25 explanation is good enough for the Supreme Court, I think

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1 the jury needs to understand the explanation of when
2 something is a gift and when something is not.

3 THE COURT: So what are you proposing?

4 MR. LEITNER: The language that we are proposing
5 is from the defense proposed instructions.

6 THE COURT: What page?

7 MS. NESTOR: Page 9, Your Honor.

8 THE COURT: What page?

9 MS. NESTOR: Nine.

10 MR. LEITNER: Page 9 of the defense instructions.

11 MS. NESTOR: I'm not sure what the quote is.

12 MR. LEITNER: Hold on. You see the third
13 paragraph, Your Honor?

14 THE COURT: The paragraph that begins, the
15 personal benefit?

16 MR. LEITNER: Yeah. So we agree that a gift can
17 be included, but we think that has to be explained.

18 MS. NESTOR: Your Honor, just so we are clear, the
19 paragraph you used is from our instructions, which were
20 taken directly from the instructions in Salmon.

21 MR. LEITNER: There was a Supreme Court decision
22 after.

23 MR. SACK: We think the real point is just saying
24 gift doesn't really help the jury understand what giving of
25 NMPI is a gift and what isn't a gift, because it's clear

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1 that not every giving of NMPI is a gift.

2 THE COURT: Why don't we just add a paragraph?

3 MR. SACK: Yes.

4 MR. LEITNER: We are happy to add the paragraph
5 that we have proposed here.

6 THE COURT: Where?

7 MR. LEITNER: Paragraph three, in that
8 circumstance the government must prove that Schulman -- I
9 would say, intended to provide Mr. Klein with the equivalent
10 of a cash gift. That is, the government must prove that
11 Mr. Schulman made a gift of information that was the same
12 thing as trading by Mr. Schulman followed by a gift of the
13 cash proceeds to Mr. Klein. That paragraph is directly
14 lifted from Salmon.

15 MS. NESTOR: Your Honor, we think that is way too
16 limiting. That is one way this can work. Salmon is very
17 specific to its facts.

18 The court isn't saying that's the only way you can
19 have a gift.

20 MR. LEITNER: Right. It's explaining why
21 something constitutes a gift. It's because the equivalent
22 of a cash gift, of giving cash from the proceeds of a
23 securities transaction. That's why the NMPI constitutes a
24 gift.

25 MS. NESTOR: I also think the paragraph is

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1 extremely confusing, Your Honor.

2 THE COURT: I think it's confusing.

3 MR. SACK: We can refine the language, but I don't
4 think it's unfairly limiting in the following sense. We are
5 not limiting the concept of personal benefit. Personal
6 benefit, still, what the language stays that may have -- may
7 be financial or tangible in nature or it may be a gift.
8 That breadth stays.

9 All we are trying to do is give some practical
10 meaning to what kinds of gifts of information.

11 THE COURT: Isn't that covered by it can also
12 include, for example, the benefit of being able to -- blah,
13 blah, blah?

14 MR. SACK: No. That's more of a non-gift nature.
15 The gift is a particular -- there is some sort of pecuniary
16 gain, such as networking, reputation, future financial
17 benefits on the one hand. Gift is a parallel tract, is a
18 separate but parallel extract.

19 THE COURT: Right, but it says or making a gift.

20 MR. SACK: Right. All we are trying to say is but
21 what is a gift in this context? When is giving material
22 information a gift that constitutes a personal benefit? We
23 like to say it is a gift that constitutes personal benefit
24 when in effect it is the equivalent of buying -- of doing
25 the securities transactions and making a gift of the cash.

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1 That's in essence what we would be saying.

2 THE COURT: That is a confusing sentence.

3 MS. NESTOR: Your Honor, I do feel that isn't --
4 again, that case was limited to its facts. I think that
5 imposing Salmon -- and I know I'm saying it wrong -- on this
6 case, Salmon on this case, is inappropriate.

7 MR. LEITNER: Your Honor, Salmon addressed the
8 gift theory in the context of how the gift theory applies
9 between relatives. It's explaining why a gift constitutes a
10 breach of duty required for the crime.

11 The jury has to have some guidance as to why not
12 every exchange of information is a gift. The way the
13 instruction reads right now, they could think any time
14 someone gives NMPI it could be a gift to someone. They need
15 some guidance to distinguish gifts from non-gifts.

16 THE COURT: I will hear you. I just don't like
17 the sentence that you proposed.

18 MR. LEITNER: There are two ways of saying it.
19 One is that it's the equivalent, it's in effect the same
20 thing as the tippee trading himself and then giving the
21 proceeds to the tippee. The other --

22 THE COURT: Tipper.

23 MR. LEITNER: Tipper -- no, tippee.

24 MR. SACK: Tipper trades.

25 MR. LEITNER: The tipper trades and gives the

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1 proceeds to the tippee.

2 THE COURT: Confusing.

3 MR. LEITNER: The other should say that NMPI is
4 the equivalent of a cash gift based on trading. That's a
5 simpler way of saying it, based on the trading that the
6 tippee will do.

7 MS. NESTOR: Again, I just don't think that makes
8 any sense.

9 THE COURT: The second one makes more sense.

10 MR. SACK: I think -- actually, I think it's
11 especially important. In Salmon it was less important
12 because of the relationship, the familial relationship.

13 THE COURT: Work on the second sentence.

14 MR. SACK: We will.

15 MR. LEITNER: The version --

16 MR. SACK: We will.

17 THE COURT: The second one. The first one is
18 confusing.

19 MR. LEITNER: The cash equivalent.

20 MR. SACK: Not the equivalent one, the one with
21 just the cash gift.

22 MR. LEITNER: We will work on that proposed
23 language.

24 THE COURT: Yes.

25 MR. LEITNER: The other issue we have with the

1 personal benefit instruction is we think the jury should
2 understand that they cannot infer that a gift was given
3 merely from the fact that Mr. Klein and Mr. Schulman are
4 friends. That's directly lifted from Newman.

5 Now, Salmon came after Newman, but Newman had two
6 holdings. One, that friendship is not enough; two, the
7 tipper has to get pecuniary or some other gain. Salmon
8 governed with the second holding. The tipper no longer has
9 to receive something in return.

10 Salmon said absolutely nothing about the
11 circumstances in which a gift of information between
12 friends -- excuse me, when a gift can be inferred from
13 friendship; and, of course, Salmon didn't have to say
14 anything about that because Salmon dealt with two family
15 members, not friends.

16 Right now, in this circuit, Newman's directive
17 that you cannot infer a gift just because two people are
18 friends is binding, absent Supreme Court precedence directly
19 overruling it or making it so clear that it's going to be
20 overruled that you can disregard it.

21 The Supreme Court's decision was self-described as
22 very narrow. It had nothing do with friendship. Right now
23 that sentence from Newman is on the books in this circuit,
24 and we think it should be given to the jury for that reason.

25 MR. SACK: So what's the one sentence that we

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1 would write?

2 MR. LEITNER: Let's skip to the practical import,
3 Your Honor.

4 MS. NESTOR: We disagree, Your Honor.

5 THE COURT: Let me just hear his sentence, and I
6 will hear you.

7 MR. LEITNER: It's the last paragraph, it's the --
8 one second.

9 THE COURT: What page?

10 (Continued on the next page.)
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1 MR. LEITNER: To the extent the Government contends
2 the personal benefit received by Mr. Schulman consists of a
3 gift of non-material public information to Mr. Klein, the
4 personal benefit cannot be inferred from the mere fact of a
5 friendship between Mr. Schulman and Mr. Klein, particularly if
6 their friendship was of a casual or social nature.

7 MS. NESTOR: Your Honor, that eliminates any type of
8 friendship. That makes absolutely no sense.

9 Again, I've read this over seven times, Your Honor.
10 I don't understand the argument.

11 MR. LEITNER: Well, Your Honor, it makes a lot of
12 sense. It means you need other context besides the fact that
13 two people are friends.

14 MS. NESTOR: Of course, you need an actual gift.
15 What other context are you talking about?

16 MR. LEITNER: Ms. Nestor, then any time people are
17 friends and information is given, does that mean that it's a
18 gift?

19 MR. PITLUCK: So you contend that Salman's holding
20 only applies to that?

21 MR. LEITNER: My contending is that Salman doesn't
22 get rid of the Second Circuit's holding that the friendship
23 needs to be somewhat robust to support the gift theory. Mere
24 friendship is not enough. Something more needs to be there.

25 MS. NESTOR: What does mere friendship mean? That

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1 is confusing. Mere friendship is enough.

2 That's no what Newman says here.

3 MR. LEITNER: Newman says --

4 MS. NESTOR: First of all, Newman is inapplicable
5 here, Your Honor. It's a downstream tippee case where the
6 tippees had no relationship at all to the person who was
7 giving the tip.

8 MR. LEITNER: Your Honor, that's the Government's
9 typical pivot when Newman is brought up, it involves
10 downstream tippees.

11 THE COURT: But it does involve downstream tippees.

12 MR. LEITNER: Yes. But, Your Honor, the case
13 specifically addresses the personal benefit element and what
14 it means. That's the heart of Newman. Personal benefit
15 requires X, and then Newman goes on to describe what the X is.

16 The fact that downstream tippers were involved is
17 neither here nor there. Its holding on what you need for a
18 personal benefit remains the law in this circuit to the extent
19 it wasn't overturned by *Salman*, and its friendship language
20 was not overturned by *Salman*.

21 MS. NESTOR: It's actually really confusing what was
22 overturned by *Salman* because the paragraph, Your Honor, that
23 paragraph is all one paragraph, actually.

24 I've looked at this seven different times. I don't
25 believe that -- I don't understand the argument, to begin

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1 with. I'm sure I'm not as smart as Mr. Leitner, but I don't
2 think that -- what does it mean to say "mere friendship"? I
3 mean, what kind of friendship would be enough? Are we
4 instructing the jury on what they need to find in terms of
5 friendship? Do they have to exchange rings? I mean, I don't
6 understand.

7 MR. SACK: Let me try. I think what we're really
8 arguing --

9 THE COURT: Wait. Let me ask you something, Ms.
10 Nestor.

11 The last sentence here that says: The Government
12 must prove beyond a reasonable doubt that the friendship
13 between Mr. Schulman and Mr. Klein was such that when Mr.
14 Schulman provided material, non-public information to Mr.
15 Klein he was doing the equivalent of trading and then making a
16 gift of the proceeds to Mr. Klein.

17 Do you agree that that states the law?

18 MS. NESTOR: You're reading from the instruction on
19 page 9?

20 THE COURT: Yes, page 9, the last sentence.

21 MS. NESTOR: I mean, Your Honor, again, I think it's
22 too limiting because I don't think that's necessarily what
23 Salman is saying. It's saying to the facts in that case. I
24 don't disagree that this is what the case held, but I just
25 don't believe that it's necessary to instruct this jury on

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1 that because I don't think that's the only way you can give a
2 gift. It's not necessarily exchange for money. You can give
3 a gift of reputational benefit, for instance.

4 I just think it's confusing. It confuses me and I'm
5 not a juror. I mean, it's just confusing.

6 MR. LEITNER: Your Honor, reputational benefit is in
7 the instruction.

8 The question is when a gift of NPI is actionable?
9 That's the question. What constitutes a gift? We have an
10 explanation given from the Supreme Court and it's in this
11 sentence right here. Otherwise the jury is at sea with
12 respect to determining which transfers of NPI are gifts and
13 which aren't.

14 THE COURT: They're not going to be -- I think
15 you're making more of it than there is in this case. I think
16 the facts in this case are pretty simple, and I don't want to
17 confuse the jury.

18 Is there some way you can come up with some kind of
19 agreement on a different sentence? I don't like this
20 sentence.

21 MR. LEITNER: Which one?

22 THE COURT: Your sentence: The Government must
23 prove beyond -- I don't want to read it again. The last
24 sentence on page 9.

25 MS. NESTOR: She's talking about this sentence

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1 (indicating).

2 MR. LEITNER: Your Honor's problem is with the first
3 part of the sentence or the second part of the sentence?

4 THE COURT: The whole sentence.

5 MR. LEITNER: We certainly can get back to you on
6 language about the cash gift that we had talked about earlier,
7 but we also want to address the friendship part as well.
8 Because the directive from Newman is that the jury should not
9 be allowed to say a given was given just because they're
10 friends. That's the law in the circuit.

11 THE COURT: That's not what I'm instructing.

12 MR. LEITNER: But does Your Honor disagree that
13 that's the law from Newman?

14 MR. SACK: I think the judge is saying that there's
15 enough here to contextualize.

16 THE COURT: Well, right now I'm satisfied with what
17 I did. If you want to submit something, you may.

18 MR. LEITNER: And you think it should be along the
19 lines of the cash gift?

20 THE COURT: It should be a lot clearer than this.

21 MR. LEITNER: Okay.

22 MR. SACK: We'll work on it, Your Honor.

23 THE COURT: What's next after page 25?

24 Do you have something on 25?

25 MS. NESTOR: I don't even know anymore.

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1 No, Your Honor.

2 MR. PITLUCK: We've come to agreement that we don't
3 need the aiding and abetting.

4 MR. SACK: I have something on 26 though.

5 MR. PITLUCK: Come on. You took the wind out of my
6 sails though.

7 MR. SACK: That was really terrible. We have an
8 agreement, Your Honor. Let's state the agreement.

9 MR. LEITNER: Announce it.

10 THE COURT: I thought, okay, they're going to come
11 up, and take this as a compliment, Mr. Mead, a Mr. Mead type
12 argument on aiding and abetting because -- take it as a
13 compliment, like something really ingenious and clever that I
14 haven't thought of.

15 MR. PITLUCK: Rest assured, Your Honor, we have that
16 explanation. I just, I don't want to go into it.

17 MR. LEITNER: He said he'd give it to me over a
18 beer.

19 MR. PITLUCK: We don't think it's appropriate.

20 THE COURT: Yes, thank you.

21 MR. SACK: If you don't mind going back to page 26.

22 THE COURT: Yes, I'm on page 26.

23 MR. SACK: So, in the final paragraph on page 26,
24 here's my concern.

25 It's clearly trying to sort of summarize some

1 fairly --

2 THE COURT: It's a wrap-up.

3 MR. SACK: It's a wrap-up. But here's the problem
4 with the wrap-up. It's the second sentence.

5 Your Honor is giving a further explanation: That
6 is, the Government must prove beyond a reasonable doubt that
7 the defendant provided MNPI decline while - I believe it
8 should say - intending that Klein would purchase securities.

9 But that's only the intent. It doesn't summarize
10 the willfulness and it doesn't summarize the benefit.

11 So if it is a wrap-up, it shouldn't be a somewhat
12 truncated wrap-up. So what we would ask --

13 THE COURT: But then the next page, that's why it's
14 not truncated because we have the whole next page, or the
15 knowingly and willfully is for you to determine, blah, blah,
16 blah.

17 MR. SACK: But the first sentence says: The
18 Government's not required to show, et cetera, so long as it
19 proves the defendant acted knowingly, willfully and with
20 intent to defraud. But then the "that is" sentence only talks
21 about intent to defraud, and I think that's somewhat unclear
22 to the jury.

23 THE COURT: Maybe I should just omit that whole
24 paragraph.

25 MR. SACK: Or you could keep the sentence.

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1 THE COURT: Which sentence?

2 MR. SACK: "The Government is not required to show."
3 We can live with that.

4 THE COURT: And then take out the last sentence?

5 MR. SACK: Take out the last sentence. And then I'd
6 have one edit in the first sentence now, is to insert after
7 the word "proved" "beyond a reasonable doubt."

8 THE COURT: I'm fine with that.

9 MR. PITLUCK: I'm not following.

10 THE COURT: Are you on page 26?

11 MR. PITLUCK: Yes.

12 THE COURT: At the bottom.

13 MR. PITLUCK: Yeah.

14 THE COURT: The last paragraph begins: The
15 Government is not required.

16 It would read: Not required to show that the
17 defendant also knew that he was violating some particular
18 federal statute as long as it proves beyond a reasonable doubt
19 that the defendant acted knowingly, willfully and with intent
20 to defraud.

21 And then take out the last sentence because the
22 defense view is that it doesn't explain enough. It's just
23 kind of one-half.

24 MR. SACK: Could we just confer for one moment?

25 THE COURT: You changed your mind?

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1 MR. PITLUCK: Judge, I'd like to let the record
2 reflect we got rid of aiding and abetting.

3 MS. NESTOR: We also asked Mr. Mead if he was going
4 to come up with a new argument on the complaint on Monday and
5 to let us know in advance.

6 THE COURT: So, aiding and abetting took up like a
7 page-and-a-half. So now you have a page-and-a-half credit,
8 so.

9 MS. NESTOR: Where's our credit?

10 MR. SACK: We just took out a sentence, Your Honor.
11 We're getting there. We're fine with what we just said.

12 THE COURT: What's next? Can we move to page 27?

13 MR. SACK: I really think the next issue's in
14 conspiracy, Your Honor.

15 THE COURT: Do you have anything before that?

16 MR. PITLUCK: No, Judge.

17 MS. NESTOR: No.

18 THE COURT: Okay. What page?

19 MR. SACK: 34.

20 THE COURT: Okay.

21 MR. SACK: So, in a nutshell, Your Honor, we think
22 it's really important because the conspiracy talks about
23 knowingly and willfully joining and participating in the
24 conspiracy, obviously. But then does not talk about what that
25 means in this context.

1 So what we would think really is very important to
2 be done is to make an express reference back to the mental
3 state requirements of the substantive offense, not a
4 reiteration of all of the charge, but where it talks about,
5 for example, and there's two places, but I'll just take one
6 example. The top of page 34, the first full very brief
7 sentence: Thus a defendant enters a conspiracy knowingly and
8 willfully, et cetera, with knowledge of and intent to further
9 the unlawful object.

10 An express reference there that the object, and I
11 don't have the exact wording, but we'll propose it
12 momentarily, is a reference back to the knowing, willful and
13 intentional misconduct in the first -- in Count Two, what
14 you've already charged the jury.

15 And then there's one other place.

16 THE COURT: Why is that necessary where I say: And
17 the intent to further its unlawful object? Why do I have to
18 hit them over the head with what the object is again?

19 MR. LEITNER: Because, Your Honor, all you say is
20 "securities fraud." I think it makes sense to say what was
21 the fraud. It's the scheme of the essential elements that you
22 already instructed and that's actually --

23 THE COURT: Wait.

24 MR. PITLUCK: Judge, I don't think we're -- I'm
25 looking at the same paragraph the Court is where you say "with

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1 the intent to further its unlawful object" on page 34.

2 Is that the one you were referencing?

3 MR. SACK: And there's one other place too.

4 MR. LEITNER: Correct.

5 MR. SACK: Where's the other place, Curtis?

6 MR. LEITNER: The other place is page 34, second
7 paragraph.

8 MR. SACK: The second paragraph?

9 MR. LEITNER: No, no, the first paragraph.

10 There are two relations back, Your Honor, one with
11 respect to the agreement and one with respect to the mental
12 state, of joining the conspiracy.

13 We want a relation back with respect to both and
14 that's where --

15 THE COURT: Where on page 33?

16 MR. SACK: The first paragraph.

17 MS. NESTOR: The second element of conspiracy?

18 THE COURT: But we say here: To achieve an unlawful
19 object, in this case, securities fraud.

20 MR. SACK: Yeah, but it's helpful but what does that
21 mean in this context. It seems to me important to say: The
22 object that I've just described to you just now," which is
23 precisely what Judge Rakoff did in the Gupta case.

24 THE COURT: Just tell me what you would want me to
25 say --

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1 MR. PITLUCK: Judge, how about --

2 THE COURT: One second.

3 MR. PITLUCK: I'm sorry. Go ahead.

4 THE COURT: Let me just point them to where I want
5 them to go, and then I can hear their suggestion.

6 Where it says: An unlawful object, in this case,
7 securities fraud, you would like me to take out "securities
8 fraud" and insert something else?

9 MR. LEITNER: Two sentences.

10 MR. PITLUCK: Judge, if I may be --

11 THE COURT: Let me hear you.

12 MR. PITLUCK: We wrote, I think it's very clear and
13 I just used this: That I already explained this to you in my
14 instructions regarding securities fraud as set forth in Count
15 Two.

16 So you say: In this case, securities fraud as set
17 forth in Count Two, or as I discussed in Count Two, or as I
18 told you about in Count Two.

19 MR. LEITNER: We want to lift the exact language
20 from Rakoff's instructions, from Judge Rakoff's instructions,
21 which is: The object of the conspiracy consists of a scheme
22 to engage in insider trading in King securities.

23 Specifically, it is to undertake that any scheme -- a scheme
24 that meets the essential elements of the insider trading as I
25 have already explained to you and.

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1 THE COURT: I usually think he does like the right
2 thing, but I'm not going to do that. It has to be shorter. I
3 don't think that's all necessary.

4 "In this case, securities fraud, which I've
5 explained before in the instruction."

6 MR. LEITNER: Well, maybe a reference to the
7 elements that you have outlined before.

8 THE COURT: Give me language. Tell me exactly what
9 you want me to say and I'll consider it.

10 MR. SACK: Can we do that over the weekend?

11 THE COURT: You can, but I may not, which I'll tell
12 you, of course, Monday morning if I don't think that it's
13 necessary.

14 If you want to propose language, it needs to be
15 tight.

16 MR. SACK: Tight.

17 THE COURT: Because I'm not convinced that it's
18 necessary.

19 Okay. Now we're on 33. I know you have the same --

20 MR. SACK: So we have the one other place, and we'll
21 get you some tight language.

22 MR. LEITNER: Tight language for that as well, Your
23 Honor.

24 MR. PITLUCK: Judge, we'll respond on Monday. We're
25 not going to brief this over the weekend, if that's okay.

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1 MS. NESTOR: I may not respond on Monday.

2 I'm just kidding.

3 THE COURT: Yeah, we'll just see what they have. I
4 mean, I'm dubious, but I'm always happy to hear you.

5 MS. NESTOR: That's it.

6 MR. LEITNER: Hold on one second.

7 (Pause.)

8 MR. SACK: I'm sorry, I actually do.

9 THE COURT: Okay. What page?

10 MR. SACK: It's a very small thing.

11 THE COURT: Well, it will be a small thing until Mr.
12 Leitner discusses it.

13 MR. LEITNER: I thought Mr. Mead was the longwinded
14 one.

15 MS. NESTOR: Mr. Mead has been -- I have to give him
16 some credit here. He's been sitting here nice and quiet the
17 entire time.

18 MR. LEITNER: You said you were waiting to hear from
19 me for a couple of days.

20 MR. SACK: So, it's page 24 carrying over to 25.
21 The sentence is: A tip from an insider that is more reliable
22 and specific than unconfirmed facts or public rumors.

23 It says: Is non-public information. I think it
24 should be: May be non-public information despite the
25 existence of such.

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1 THE COURT: Yes, I agree. That's a good one.
2 That's a thank you.

3 All right. What's next?

4 MS. NESTOR: I think we're done.

5 THE COURT: Okay. We're working on a verdict sheet?

6 MS. NESTOR: We have. We will file one.

7 Okay, good.

8 MR. PITLUCK: Unless --

9 THE COURT: No, I'd like one from you.

10 MR. PITLUCK: Okay.

11 THE COURT: Okay. So tell me, in terms of timing, I
12 was hoping we'd have summations on Monday, and I was hoping to
13 charge on Monday, but it depends on how long. We have a chart
14 or something from you, a summary witness, and Dubinsky.

15 MR. MEAD: And we'll probably call two case agents
16 for very specific prior inconsistent statements by Shechtman.
17 Depending, I mean, literally I'm thinking the direct would be
18 five minutes or each of them, though I obviously ask for
19 permission to question as adverse witnesses.

20 THE COURT: Right. But Dubinsky, how long?

21 MR. MEAD: Well, you just heard it.

22 THE COURT: Well, it's not going to be that long.

23 MR. MEAD: Yeah, pretty much. I mean, I ran
24 through.

25 THE COURT: Please do not make me hear his

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1 qualifications to that extent again. I mean, you can collapse
2 that.

3 MS. NESTOR: His family life is also kind of
4 irrelevant.

5 THE COURT: What was his family?

6 MS. NESTOR: I don't know what --

7 MR. PITLUCK: I had kids and I came back.

8 MR. MEAD: I can skip what his parents did for a
9 living.

10 MS. NESTOR: I was hoping we weren't going to go
11 into what he did in preschool.

12 MR. PITLUCK: Judge, there's the specific risk, as
13 we said, about the, like, the certified fraud examiner portion
14 of the qualifications. That's not relevant here.

15 So, I don't want to object. I don't want to have to
16 go to sidebar, but, you know, what we heard, I timed it, it
17 was 25 minutes of qualification, and I get that that's
18 appropriate in a Daubert hearing to give the Court the full
19 understanding.

20 THE COURT: Well, wait. I mean, you could truncate
21 it a lot and just you stipulate he's an expert in whatever.

22 MR. SACK: That's not entirely fair when we're
23 putting on an expert to establish his credibility.

24 THE COURT: Well, he's a financial -- all the things
25 that he is that are relevant to the issues he's going to

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1 testify about.

2 MR. SACK: And that he's testified on the
3 government's behalf where he's been an expert on the
4 government's behalf?

5 THE COURT: Yeah, fine. But it went a long time. I
6 don't see how we'd finish before lunch.

7 MR. PITLUCK: I also don't see how any specific
8 instances of cases of unrelated topics and subject matters.
9 You know, certainly if he has testified on the government's
10 behalf, that's fine.

11 THE COURT: Yeah.

12 MR. PITLUCK: But in the Madoff case, just as an
13 attempt to -- they're unrelated, and what he's testifying to
14 is very -- has been specifically delineated by the Court
15 related to investment advisory and we think that's
16 appropriate.

17 MR. MEAD: Judge, I have to tell you there's no way
18 in the world that I want my expert not to testify that he was
19 hired by FINRA twice to talk about brokerage behavior and he
20 was hired in the Madoff case.

21 We have a very different view --

22 THE COURT: I don't mind you saying he was hired by
23 FINRA, but I don't think I need to hear that he was hired for
24 the Madoff case. He was hired by FINRA, fine.

25 MR. MEAD: Your Honor.

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1 THE COURT: But what he's going to testify about has
2 to do with what literature was out there in the field around
3 the time that it's relevant to this case.

4 So, it just went on for a really long time.

5 MR. MEAD: I'll try to shorten it, Your Honor, I
6 really will. But here's the problem.

7 You know, you don't win trials just by putting on a
8 scintilla of evidence that helps you. You put on, when a
9 man's life is at stake, everything you've got. And I don't
10 care if I --

11 THE COURT: Well, that's why I'm here.

12 MR. MEAD: No, but that's not fair. This is the
13 only thing I got on an expert, and I need to be able to tell
14 the jury that this man has been trusted by the United States
15 Government. He's testified in cases they've heard about. It
16 makes him more credible. It makes his testimony more helpful
17 to an innocent man.

18 And I will try to keep it short. I understand your
19 point, but we -- I -- if I had ten witnesses to call that
20 were, you know, that corroborate in some central fact that was
21 critical to the defense, I'd call them all with no apologies.

22 THE COURT: Okay. How long are you going to be with
23 him?

24 MR. MEAD: So, I mean, the direct in terms of
25 substance, I mean, obviously you're telling me not to go into

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1 the financial report reading stuff, so that will cut.

2 But, you know, literally I think what you heard on
3 substance in terms of the slide is exactly what I'm going to
4 do with him in front of the jury. So it takes about an hour,
5 I think, on substance.

6 MR. PITLUCK: Judge, there's obviously going to be
7 significant cross.

8 MS. NESTOR: Your Honor, I think we got here at 1
9 and we were done with him by 4.

10 MR. SACK: Well, we started about 1:30.

11 MS. NESTOR: But nonetheless, that's --

12 THE COURT: How do you feel --

13 MR. PITLUCK: And Judge, there may be -- we may have
14 issues with the impeachment and the inconsistent statements.

15 THE COURT: How do you all feel about, how do you
16 feel about summations Monday and charge Tuesday morning then?
17 I don't know if you have a -- how you feel about breaking that
18 up.

19 MS. NESTOR: Your Honor, I can start summations on
20 Monday afternoon. My concern is we won't start 'til 3
21 o'clock, and defense counsel I know is not going to be less
22 than three hours.

23 THE COURT: I don't know that.

24 How long do you think you're going to be?

25 MR. MEAD: Probably 45 minutes to an hour.

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1 MS. NESTOR: That's great. That's all right then.

2 MR. MEAD: I mean, you heard --

3 MR. PITLUCK: You got that?

4 MR. MEAD: Obviously I don't want to commit whatever
5 else. I may go a little longer, but there's a limit to what
6 juries can tolerate. I try not to step over that.

7 THE COURT: Well, I have a little bit in the bank in
8 terms of goodwill with this jury. So maybe if we have to go
9 Tuesday, we'll go to Tuesday.

10 I prefer to do summations and charge in the same
11 day.

12 MR. PITLUCK: Judge, it's not a really lengthy
13 charge. I mean, it's --

14 THE COURT: No, I know.

15 MR. PITLUCK: I think there's also, as the Court is
16 I'm sure aware, there's the snow issue on Tuesday.

17 THE COURT: On Tuesday?

18 MR. PITLUCK: They're calling for five to eight
19 inches on Tuesday, which is a new, fun joy.

20 THE COURT: Another good reason we're not in Islip.

21 MR. SACK: Amen.

22 MR. MEAD: I think we can get it done Monday.

23 THE COURT: We'll do our best.

24 MR. MEAD: I really think we can.

25 THE COURT: Thank you.

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1 MR. PITLUCK: Thank you, Judge.

2 (Time noted: 6:52 p.m.)

3 (Whereupon, the proceedings were adjourned to
4 March 13, 2015, at 9:30 a.m.)

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